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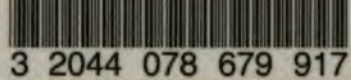
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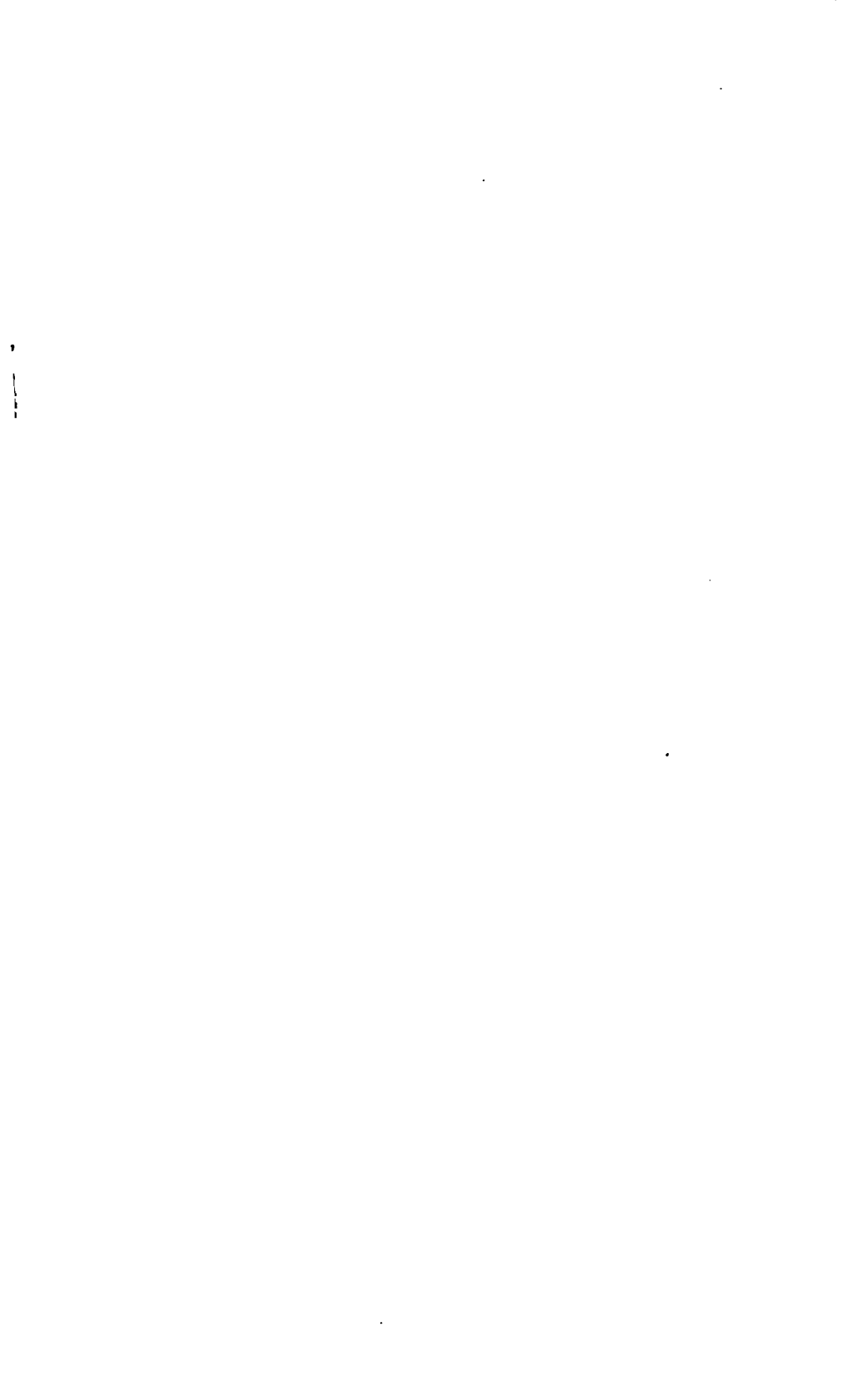
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LOUISIANA
ANNUAL REPORTS.



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July 7

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF LOUISIANA.

VOL. 49—FOR THE YEAR 1897.
PART I.

WALTER H. ROGERS, REPORTER.

NEW ORLEANS:
F. F. HANSELL & BRO., PUBLISHERS
1898.

Rec. Apr. 29, 1898.

JUSTICES OF THE SUPREME COURT.

DURING THE TERM OF THESE REPORTS.

CHIEF JUSTICE:

FRANCIS T. NICHOLLS.

ASSOCIATE JUSTICES:

LYNN B. WATKINS,
JOSEPH A. BREAUX,
HENRY C. MILLER,
NEWTON C. BLANCHARD.

ATTORNEY GENERAL:

M. J. CUNNINGHAM.

CLERK OF THE COURT:

T. McC. HYMAN, New Orleans.

ERRATA.

Page 71, line 5, erase the words "in the same case."

Page 391, line 8, for "English" read "British."

Page 398, line 12, for "English" read "British."

Page 398, line 31, for "English" read "British."

Page 588, for "Sibley" read "Gilly."

IN MEMORIAM.

NEW ORLEANS, MONDAY, February 1. 1897.

The Court was duly opened, pursuant to adjournment. Present: their Honors Francis T. Nicholls, Chief Justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, Associate Justices.

At this time Mr. Frank L. Richardson stated that, owing to the illness of Mr. James McConnell, president of the New Orleans Law Association, he had been requested to present to this Court resolutions adopted at a meeting of the members of the bar touching the late CHIEF JUSTICE MERRICK, which, with the leave of the Court, he proceeded to read, as follows:

“ RESOLUTIONS.

“ WHEREAS, it has pleased Divine Providence to remove, at the advanced age of eighty-seven years, from his life of remarkable diligence and usefulness, and of devoted professional labor, the oldest practitioner at the bar, EDWIN THOMAS MERRICK, doctor of laws, who, under the Constitution of 1852, was Chief Justice of the Supreme Court of the State of Louisiana; and

“ WHEREAS, the New Orleans Law Association consider it to be due to the memory of JUDGE MERRICK to place on record the expression of their feelings on an occasion of such solemnity; be it

“ *Resolved*, That the benefit to the career of the American lawyer, no matter where he may practise his profession, of a general acquaintance with the institutions of our great country, finds a striking example in the instance of JUDGE MERRICK, who, a native of the commonwealth of Massachusetts, owed the training of early life to three different States, and who, having attained to proficiency in the common law, was (like JUDGE MERRICK) able to use his knowledge with constant advantage in the administration of justice in the civil law State of Louisiana. Later on the course of events found JUDGE MERRICK ready, for like reasons, to engage with success and distinction in the equity practice, as (having developed itself in the common law States of the Union) it has, at last, been firmly established under the jurisdiction of the courts of the United States sitting in Louisiana. Coming to the exalted office of Chief Justice of the State, JUDGE MERRICK brought to its arduous duties, together with accumulated stores of learning and extraordinary experience as a practitioner, the power of intense application. His labors were incessant. He was a conscientious and very independent judge. He was strongly attached to the peculiar jurisprudence of Louisi-

ana, and strove to uphold and to advance it. He loved justice, and pursued it to the utmost of his talents and attainments. While he never sought to make a display, references and citations, from the fruit of unremitting research, crowded and would perhaps sometimes incumber his opinions. As a stream is slow while it winds its way through forest and thickets, but, as it reaches the plain, hastens forward and reflects the features of the landscape, the style of the Chief Justice, as here and there it left the authorities to dispose of questions of public rights, appeared to derive fresh strength from the subjects under consideration, and to grow into eloquent exposition of the principles of civil liberty which he cherished.

“His presidency of the Court adopted the traditions and usages which had attached themselves to the place when it came to him. He was exact and formal. He enforced every one of the rules. He was watchful of the dignity of the Court. He was jealous of its high honor. He repressed at once anything which bordered on improper line of remark, or on light conduct on the part of counsel. It was impossible not to understand the general spirit and resoluteness of his bearing.

“In his time attendance upon the sessions of the Supreme Court were apt to be large. Cases of importance were frequent, and called for the services of eminent lawyers. The practitioners who constituted the bar of the period made up a distinguished body. They conducted the cases in hand, as a general rule, with studied deference to the bench. The Court, guided by the Chief Justice, turned habitually with close and often with devoted attention to the discussions progressing before it. The pressure of public business upon all the justices was very great. The Chief Justice, who prepared his full proportion of the decisions rendered, besides his other duties, undertook the assignment of cases to the associates.

“*Resolved*, That the character of JUDGE MERRICK was a singularly pure one. He was domestic, temperate, simple in all his habits, modest, patient, punctual and exceedingly studious. Like his disposition, his address and manners showed true simplicity. He was plain, and very direct in what he had to say. In his family relations he was a good husband and a loving parent. With his brethren of the Bar he was courteous and considerate and often generous. He loved his fellow-men and felt happy in the success of others. He encouraged young men by his notice. He insisted on the rewards which are sure to follow lives consecrated in a true sense to the noble profession of the law.

“All will remember how, in exercising the privilege of survivorship which his venerable age and position devolved on him, he claimed again and again from the contemporaries at the bar, as they departed this life, the praise to which he thought them entitled. His remarks on some of the occasions here referred to will be valuable for future use, because of the strict regard for truth with which it was his habit to speak, and, besides, for the information which his uncommon opportunities supplied

him with. His last address was a tribute to the late J. Ad. Rozier. JUDGE MERRICK stepped forward to place a flower on the passing bier of his lamented friend. He seemed to be then in the best of health and to be entirely free from the infirmities of age. In a few days only, with the recollection of this sad and affectionate office still present to everybody, he himself was followed to the grave with an imposing manifestation of the consideration and esteem in which he was held both in public and private life.

"*Resolved*, That the president of the association be requested to present these resolutions in the Supreme Court and to accompany them with appropriate remarks out of respect for the memory of JUDGE MERRICK, and that a copy be furnished his family, together with the expression of the sincere sympathy of the association for their bereavement."

Mr. Richardson then addressed the Court in the following language:

"It is appropriate that this action be taken in commemoration of one who was a member of the bar and the bench of this State for over fifty years, and who was the sole survivor of a long line of eminent chief justices that have passed away. When he came to this bar in the year 1839, the Supreme Court was then only composed of these judges, viz.: Mr. Justice Francois Xavier Martin, the presiding judge, for at that time he was not designated as chief justice; Pierre Adolph Rost and George Eustis.

"In that year Justices H. A. Bullard and Henry Carleton had resigned their seats. His opponents and colleagues at the bar were such men as Slidell, Preston, Roselius, Benjamin, Derbigny, Mazureau, Randell Hunt, Grimes and Elgee. They were the men whom we of the younger generation were in the habit of calling the giants of those days.

"His clients in the country parishes of the Felicianas and Wilkinson county, Mississippi, were the pioneers who cleared the forests.

"I first met JUDGE MERRICK thirty-one years ago, when I came as a country boy to attend the law lectures in this city, and he kindly gave me a seat in his office and the use of his books. I found him to be a man most temperate in his habits, precise and systematic in all his work, and extraordinarily industrious; devoted to his books, and particularly of the drier and most abstruse works, such as "*Coke on Littleton*," "*Contingent Remainders*," and "*Justinian de Corpore Juris Civilis*;" student of the Greek language, and of many of the sciences.

"While making no pretensions to oratory, yet he was a most dangerous opponent. Zealous in the protection of his clients' interest, and by his indefatigable industry, he was likely to succeed where genius, endowed with eloquence, would fail.

"I last saw him a few days before his death, when he attended a meeting of the members of the Law Association, and moved the adoption of resolu-

tions upon the death of his old friend, the late J. Ad. Rozier. I observed then that he was growing somewhat feeble, and the weight of eighty-seven years had begun to tell upon him, though he would not admit it to himself. As he left the room I heard him say to his son, on whom he was leaning, and on looking around at the large collection of books: 'Do we need any more of these books?' And he seemed to leave his old friends, the books, with great reluctance; for in these books were his own ideas and his own decisions rendered during some seven years, the reports of his own cases, of which he was counsel for plaintiff or defendant, during fifty years.

"He reminded me of an old neighbor in St. Mary parish, who had seen the trees which he had planted grow up, and had watched them for over fifty years, and when he was called on to leave his home at a greatly advanced age his neighbors gathered to see him depart for the last time, and, passing through his friends, the trees, he looked at them longingly, and, with a wave of his hand, exclaimed: 'Adieu, mes arbres.'

"So the old judge left his books, little thinking that his own book of life would be in a few days closed forever.

"As a citizen JUDGE MERRICK performed all the duties which that position required. Though from a Northern State, and many of his friends in Massachusetts, where he was born, and though devoted to the Union, and opposing secession, yet when the war began he upheld his State, opened his court in the Confederacy, and heard his cases as heretofore, and sent his then only son, David Merrick, to the front in Virginia. And the judge used to often say he liked the title of captain, because that was his son's title when he was so severely wounded.

"Pure as a puritan, but not of their thinking; following all the laws of the strictest morality, but not because of any command to do so, he departed this life with a trust that this was the beginning of another and better life. There may be no monument erected to him of marble or brass, but his works, his thoughts, his life, his decisions as judge, are in the archives of the State, and will last longer than brass or marble. His memory will live with his successors.

"Shall we meet again? In the dream of Ion, the young Greek hero is told by the oracle of his death decreed for the following day, and he is asked by the maiden who was his love, 'Shall we meet again?' He answers, 'I have asked that dread question of the hills that stand eternal, of the streams that never ceasing flow, of the stars that shine forever, among whom my spirit oft has soared. They have answered me not again. But now, when I look on thy living face and feel that the love that it kindles shall live forever, I now know we shall meet again.' "

"Mr. Chief Justice, I move the adoption of the resolution."

The motion was seconded by ex-Justice William Wirt Howe.

On behalf of the Court, His Honor the Chief Justice replied:

"When CHIEF JUSTICE MERRICK, only a week or two ago, addressed

this Court, speaking in terms of earnest praise of a member of the bar, whose death was then announced, we little thought it was his last appearance in the tribunal over which he had so long and so ably presided as the Chief Justice. On that occasion he dwelt upon the powerful influence exerted through absolute faith in the honesty, purity and integrity of one of our fellow-men.

“The words he then used come back to us to-day, for what he then forcibly said of another, can well be said of himself. Throughout a life prolonged beyond four score years and ten, no one in all that time stood higher than he, none in whom was imposed more implicit confidence.

“To his private virtues were added qualities which caused his performance of public duty to justify the high opinion which his people had formed of his industry, his ability and his impartiality. The high expectations to which that opinion had given rise were fully realized.

“The Court endorses thoroughly what has been said of him by the bar and unites with it in regret at his death and in sympathy with his family.

“The resolutions will be entered upon the minutes of the Court, a copy of these proceedings will be transmitted to the family of the deceased by the clerk, and as a mark of respect to the memory of the distinguished jurist, the Court will stand

“Adjourned to Tuesday, February 2, 1897, at 11 A. M.”

NEW ORLEANS, WEDNESDAY, June 30, 1897.

The Court was duly opened pursuant to adjournment. Present: their Honors Lynn B. Watkins, Joseph A. Breaux, Henry C. Miler, Newton C. Blanchard, Associate Justices. Absent: Francis T. Nicholls, Chief Justice.

Mr. Carleton Hunt, a member of the bar, arose and addressed the Court as follows:

“*May it Please the Court:*

“At the request of Mr. Edwin T. Merrick, on behalf of the family of his father, the late Edwin Thomas Merrick, doctor of laws, I present to the Court the portrait of the latter, as that of the third Chief Justice of Louisiana, in order that it may take its place in the historical gallery of the Supreme Court.

“Having, on behalf of the bar, prepared the resolutions which were read in this Court, on the occasion of the death of Judge Merrick, I do not renew, at the present time, an extended notice of his life and character.

“It is sufficient for me to note that with the addition of this portrait the collection here made now contains the pictures of all the former Chief Justices of the Supreme Court. The first Chief Justice, George Eustis, LL. D., took his seat March 19, 1846. It is interesting to observe that

down to the time of the accession of Chief Justice Nicholls, Judge Eustis has had but six successors, Chief Justices Slidell, Merrick, Hyman, Ludelling, Manning and Bermudez. To what a small number the honor of being Chief Justice is limited is apparent when it is remembered that in a period of more than fifty years seven only have been called to the office.

“Undoubtedly the noblest honors are those of the magistracy. The ambition to earn in high judicial station the applause which after times bestow on good and virtuous actions, is the highest that can inspire the breast of man.

“Whoever has been able to fill the office of Chief Justice of a great Court like this, has had opportunity enough to put power and dignity to their best uses. Undoubtedly Judge Merrick had love of country, fidelity to duty, learning, the discrimination properly to apply the law, and the constant and perpetual disposition to render every man his due. These are the true qualifications of the judge, and the possession of them by the former Chief Justice entitles his memory to the honors which are now rendered it.”

To which His Honor, the presiding justice, replied:

“On the part of the Court, I express its fullest appreciation of the portrait of the late Chief Justice, E. T. Merrick, who for many years presided over its deliberations with great dignity and rare ability; and whose opinions, as organ of the Court, are amongst the ablest and most erudite which ornament its reports.

“The Clerk will place the picture in its proper position amongst those of the other deceased jurists whose portraits ornament the gallery of this Court, and inscribe these proceedings on the minutes of this day, and furnish his family a certified copy under the seal of the Court as a testimony of its sympathy and regard.”

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2	1,618		1,750	135	1,615		359
6	1,618	48	1,777	155	1,558	210	1,448
8	298	57	552		31		432
11	1,057	74	250	156	572	214	434
	1,539	(1868)			751		1,770
	374	81	250	207	928	235	553
29	1,531	(1868)			422		10
	1,538		348		427	236	395
30	1,538		450		428		422
	552		455		429		427
45	558	81	654		430		428
	115		1,225		431		429
	119		1,456		432	242	430
	552	89	1,508		434		431
	558		233		436		435
	1,156		701		437		438
	1,157		1,212		442		437
	1,201	90	1,454	209	1,183	243	429
	1,212		1,723		1,157	244	428
46	1,488		1,724		1,749	245	1,557
	1,751		338		1,758	248	553
	1,753	101	339		1,764		117
	1,759				1,767	253	119
	1,761	114	1,536		1,770		1,203
	1,762	(1868)			1,773	296	751
	1,765	(1868)	1,536		1,775	Ordinance for relief of delin- quent taxpayers	
	1,767		578		1,776		
	1,115	121	118		36		
48	1,158	128	250	210	304		
	1,201	135	1,561		358		1,513

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14	943		1,363		1,752	895	1,786
15	1,136	269	1,365	229	1,789	901	1,530
64	1,590	270	1,365	639	657	902	136
116	1,657		340	657	1,364	908	1,330
118	1,724	273	343	658	1,364	964	1,657
	1,722		1,364	660	1,364	983	1,590
130	1,727	298	883	661	1,364	987	1,590
	1,728		1,363	683	1,658	993	419
131	1,722	282	1,365	689	886	1,000	420
148	362	283	1,363	735	883	1,001	420
158	943		1,365	739	888	1,002	420
210	1,589	335	58	740	883	1,003	420
	73		701	822	689		420
240	79	351	702	830	840	1,004	973
	80		703	845	1,212		420
246	698	494	566		1,212	1,006	420
	703	495	566	855	1,057	1,007	420
247	698		34		1,057	1,008	420
	703	566	582	857	1,164	1,009	1,445
249	703		584		1,212	1,012	1,445
256	1,362	579	1,080	861	1,722	1,013	1,445
	1,365	587	881		1,057	1,054	1,445
257	1,362	594	881	864	1,719	1,056	1,445
	1,365	602	1,658		1,223		1,443
259	1,363	617	1,727	865	1,719	1,057	1,445
261	1,363	617	1,728	866	1,223	1,058	1,561
	1,365		1,727	877	1,722	1,059	1,164
262	704	629	1,728	887	1,635	1,060	1,165

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23	1,017	1,069	84	1,923	732	2,697	1,548
31	1,048	1,146	1,481		657	2,699	1,549
119	1,503	1,207	84	1,926	845		1,241
120	1,503	1,221	1,411		657	2,705	1,244
126	216	1,224	1,411	1,927	873	2,709	1,246
	217	1,223	1,411	1,928	657	2,733	1,036
	216	1,238	1,183		865	2,754	1,192
127	217	1,239	1,183	1,934	873	2,814	1,485
	227	1,240	1,183		1,038	2,859	1,877
	216	1,241	1,183		845	2,870	1,878
128	217	1,304	197	1,935	873	2,872	519
	227	1,305	197	1,985	944		13
129	1,402	1,320	1,740	2,010	143	2,924	502
138	1,715	1,333	137		143		508
	1,716	1,339	343	2,011	1,136	2,934	487
139	1,716		140	2,012	143	2,979	1,385
152	1,716	1,342	144	2,013	143	2,980	1,385
163	1,470		167	2,014	143	3,017	12
256	715		136	2,015	143	3,035	937
313	399	1,343	141	2,042	1,020	3,045	936
321	1,857		143	2,052	943	3,049	936
327	341	1,374	1,183	2,054	938		1,136
331	1,177	1,412	1,740	2,135	1,143	3,057	1,136
346	177		1,388		145	3,072	971
346	12	1,492	1,391		188	3,084	894
343	971		144	2,160	655	3,086	894
356	984	1,503	167		1,006	3,092	894
384	351		1,178		1,460	3,098	894
	602	1,519	1,183	2,161	162	3,145	728
447	1,063	1,520	1,178		1,048		732
455	539		144		878	3,152	728
458	125	1,521	167	2,234	1,382	3,158	728
462	1,045		144	2,277	779	3,166	1,238
468	125	1,522	167	2,281	844	3,167	1,238
	1,045		144		1,605	3,170	1,238
484	167	1,555	167	2,312	477	3,217	1,241
491	454		144	2,315	491		1,245
492	143	1,558	167		1,038	3,218	1,241
508	1,455	1,578	1,383	2,317	1,245		1,244
509	539		1,386	2,319	493	3,219	1,241
	1,688	1,579	1,382	2,320	491	3,227	1,045
546	144		1,383		1,470		1,048
	167	1,581	1,382	2,398	214		572
	589	1,584	1,382		228	3,247	576
685	589	1,588	107	2,402	1,581		728
	570	1,655	108	2,408	1,499	3,249	1,461
	572	1,671	1,180	2,424	1,562		144
732	144		1,589	2,446	214	3,268	167
	167	1,683	84		228		1,046
739	144	1,686	85	2,463	1,667	3,271	139
	167		144	2,497	1,667	3,274	139
757	629	1,753	167	2,505	1,484	3,285	1,021
792	70		172	2,517	313	3,301	1,020
859	541	1,764	561		318	3,365	878
861	539	1,773	1,426	2,611	585	3,452	1,451
863	548	1,790	1,481		586	3,478	582
871	604	1,848	193	2,615	655	3,480	86
873	1,111	1,889	731	2,621	572	3,484	582
911	687	1,899	845	2,622	1,278		194
912	629	1,905	1,424	1,223	1,279	3,485	582
915	261	1,906	1,424	2,625	143		194
916	281	1,917	474	2,632	862	3,486	582
917	827	1,918	474	2,658	74	3,487	582
918	827	1,921	474		1,036	3,532	519
934	1,111		474	2,692	1,549	3,547	1,490
940	1,111	1,922	477		1,038		694
1,031	465	1,923	732	2,696	1,038	3,556	944
			477		1,038	10,491	630

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119	1,016	905	200	1,049	1,694	2,323	282
120	1,016	976	288	1,052	1,694	2,328	282
123	596	986	1,355	1,064	312	2,376	31
264	1,062	980	1,228		1,526	2,448	833
	1,071	982	1,600	1,077	311	2,593	1,200
294	1,062	983	268	1,311	642	2,596	1,200
	1,071	994	268		798	2,597	1,200
318	546	995	268	1,419	1,536	2,603	1,200
627	282	1,010	912	1,421	1,536	3,034	1,205
628	282	1,021	965	1,479	30	3,066	878
683	429	1,023	295	1,483	30	3,080	878
790	271		963	1,679	1,205	3,083	878
	70	1,026	965	1,768	583	3,094	878
792	127	1,031	964	1,781	460	3,550	878
	128	1,032	754		695	3,678	1,589
	129	1,033	755	1,808	1,142	3,698	1,179
	271		912		944		1,181
850	1,357	1,047	310	1,817	1,076	8,785	1,523
	330		311	1,910	912		

ACTS OF THE LEGISLATURE CITED IN THIS VOLUME.

Year.	Number.	Page of Annual.	Year.	Number.	Page of Annual.	Year.	Number.	Page of Annual.
1843	50	268			833	1890	134	374
1826	Attach- ment.	945	1882	20	1,172	1890	140	1,465
1828	95	1,411	1882	26	1,607			236
1835	(p. 168)	1,203	1882	40	1,202	1880	150	253
1840	117	1,508	1882	49	847			766
1843	71	918	1882	96	932			1,202
1852	125	1,204	1882	119	1,212	1891	79	1,224
1855	255	1,441	1882		784	1892	104	1,815
1855	417	1,538	1882		766		106	1,192
		840			337			436
1856	164	949			338	1892	(p. 144)	1,041
1858	48	282	1882	125	359	1892	94	1,201
1868	64	182			1,561	1894	15	847
1868	150	714			1,749			82
		726			1,153	1894	24	566
		840			1,751			1,536
1870	E. S. 5	849	1882	126	1,758	1894	38	872
		948			1,764	1894	50	1,355
1870	31	1,214			1,773	1894	72	1,453
1870	45	969	1884	32	1,473	1894	84	298
1870	86	1,443	1884	63	912	1894	89	17
1870	101	1,076	1884	64	912	1894	106	1,224
1871	42	1,513	1884	76	642	1894	130	1,411
1874	3	1,514			798		181	565
1874	72	1,214			36			568
1875	E. S. 11	419			364	1894	Lotter- ies.	1,607
1875	16	1,214			365			
1875	17	1,513	1884	82	795	1896	6	1,596
1876	72	1,511			858	1896	8	1,212
1876	14	725			1,472			815
1877	7	726			1,512	1896	45	833
1877	E. S. 14	930			1,787			1,172
		1,228			1,791			1,561
1877	24	843	1884	107	784			70
		847			233			127
1877	30	560	1886	18	235	1886	59	128
1877	39	1,533			486			129
1877	44	821	1886	19	1,226			1,357
1877	122	950	1886	29	1,742	1896	70	115
1877	E. S. 131	835			1,743			1,746
1878	17	1,577	1886	78	1,744	1896	78	1,747
		1,716	1886	136	784			1,155
		1,173	1888	58	1,229			1,750
		377	1888	94	244			1,751
		1,503			843			1,752
1878	30	1,569	1888	135	536			1,753
		1,599			537	1896	90	1,754
1878	100	620			680			1,759
1879	38	950			723			1,760
1879	79	139	1888	156	731			1,761
1879	124	1,204			733			1,775
1880	45	1,561			104			1,777
1880	49	1,202	1890	41	105	1896	113	290
1880	75	1,667			447			708
1880	84	1,687	1890	43	1,011	1896	114	1,200
		1,042	1890	44	1,011			108
1880	124	58	1890	79	648	1896	129	1,015
		551			434			61
1880	125	1,274	1890	97	1,771			64
1880	136	1,202			43	1897	99	289
1880		1,054	1890	106	44			300
1882	20	576			1,175			1,577
		451	1890	134	1,465			
		537			371			

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS, 1897.

JUDGES OF THE COURT:

HON. FRANCIS T. NICHOLLS, *Chief Justice.*

HON. LYNN B. WATKINS, • HON. SAMUEL D. MCENERY, HON. JOSEPH A. BREAUX, HON. HENRY C. MILLER, HON. NEWTON C. BLANCHARD.	}	<i>Associate Justices.</i>
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No. 12,283.

METROPOLITAN BANK VS. NEW ORLEANS BREWING ASSOCIATION.

If several breweries are in the hands of a receiver, and the amount of business of each brewery is estimated, and upon the aggregate the license tax demanded by the State is paid to the tax collector, where the general business of the receiver is conducted, this is a sufficient payment, and the tax collector can not after such payment sue for the tax due by each brewery. It was paid with the aggregate estimate upon which the amount for the license tax was estimated.

APPPEAL from the Civil District Court for the Parish of Orleans,
Monroe, J.

E. H. McCaleb, Jr., for State of Louisiana, Appellant.

• Hon. Samuel D. McEnery, Associate Justice, resigned March 1, 1897.

Bank vs. Brewing Association.

Dinkelspiel & Hart and Buck, Walsh & Buck for Receiver, Appellee.

Submitted on briefs November 16, 1896.

Opinion handed down November 30, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. In the above entitled case the defendant corporation, which had been placed in the hands of a receiver, filed through said receiver an account. The State Tax Collectors for the First, Second, Third and Fourth Districts, filed oppositions to the account, alleging that the State of Louisiana had a privilege, outranking all others, for licenses due by said association for conducting business in the several districts in which breweries were located.

On motion, presumably by consent of all parties, the oppositions were transformed into rules and consolidated, and there was one answer and one judgment.

The Tax Collectors urge that a license tax should be collected from each brewery, and the receiver claims that the payment of the license tax on the business done by all the breweries, at one place where the general business is conducted, was a compliance with the law.

The evidence shows that the gross business done by the association, in all the breweries, was, for the year 1896, six hundred and eighty-one thousand eight hundred and fifteen dollars. This is the aggregate receipts of all the breweries. One of the breweries to which the receipts of the business done by the others were delivered, was located in the First District.

The Tax Collector of this district was paid the license which the State demands for the amount of business done by the association. Each brewery paid its license tax in the aggregate estimate. The tax on the amount of business done by each brewery has been paid to the State. The State, therefore, has no demand against the association.

Judgment affirmed.

O'Neill vs. Leinicke.

No. 12,208.

MRS. CARRIE AUGUSTA O'NEILL VS. CONRAD LEINICKE.

Prescription only begins to run in favor of the father who has received money for his daughter from the time demand has been made for the same, or from the date of settlement between them, showing balance due.

When money has been remitted to the father by the grandfather of his daughter, and is followed by a letter of advice which directs the investment of the capital, or a part of it, for the benefit of his granddaughter, the child of his daughter, with full discretion to the son-in-law to invest and control the disposition of the money, and there is nothing said in the letter, other than as to the use of the interest by the son-in-law for household expenses, about the money being for the individual use of the son-in-law, it will be interpreted to be as to the capital a donation to the granddaughter and not to the father.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Saunders & Miller (and *Walter Hyde Saunders*, of Counsel), for Plaintiff, Appellee.

Frank L. Richardson and *Philip H. Mentz*, for Plaintiff, Appellee.

Argued and submitted December 4, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. The plaintiff brought this suit to recover from her father the sum of twelve thousand three hundred and fifty-seven dollars.

The grandfather transmitted to her father this amount of money which she urges was intended for her. The father claims the amount, less a certain amount which he invested for his daughter. The mother of the plaintiff died before this sum was transmitted. The money was left in the father's hands, without objection on the part of plaintiff, until the institution of this suit.

There was judgment for plaintiff for the amount of the sum transmitted, less amount invested.

The money was sent without any letter of advice. It was followed by the following instructions to the father:

O'Neill vs. Leinicke.

"Father to save costs of court did not want to call it (the remittance) an *inheritance*; and in any event (uberhaupt), father was of the opinion that you would keep it *secret*, and make no communication of it to any one, *not even to Carrie*; for only too easily, on such occasions, there appear flatterers (parasites) of every kind (shape); but things that happened can no more be changed. But, as you now, as Lina's rightful heir, are unconditional disposer, and have the right to dispose of it by testament, father only desires the wish expressed that you should apply (invest) and administer this *capital* entirely according to your own will and judgment, without allowing yourself to be influenced by any one; whether you will use the *interest* (income) in your household, or donate it as dowry (marriage gift) to Carrie, is left entirely to your discretion (judgment). Only father would wish (would like) that you would invest *surely* (securely) a fixed amount for *Carrie*, that it may in age afford a certainty and not slip through the fingers. In any event, father expects positively that *Carrie*, for her own advantage, conform unconditionally to the *dispositions* (unerdaungen) of her father. You know father well enough to know that he is distinctly not in accord with the *American woman-emancipation*."

There is a conflict, in fact a contradiction in the testimony of the daughter and father in this case. Happily, we are not called upon to say which is the more reliable, the declarations of daughter or father. The contradictions in this testimony relate more particularly to the construction which the father placed upon the letter, advising him as to the disposition of the sum remitted. This letter is not a contract or agreement of dubious import to be interpreted by the conduct of the parties in relation to it and the interpretation they placed upon it.

The language and declarations of the grandfather are alone to be considered. If the money was intended as a donation to the father, but construed by the parties to be for the daughter, their construction could not destroy the donation and take it from the father, when discovering his error, he asserted his claim to the money. Nor would the father's belief, and his acts based upon it, that it was a donation to him, and acquiesced in by the daughter, who gave the same interpretation to the language of the grandfather, destroy the daughter's right to assert her claim when she discovered her error and that of her father.

O'Neill vs. Leinicke.

We will therefore eliminate the testimony of both father and daughter, except so far as it relates to the immediate production in evidence of the declarations of the grandfather contained in the above letter.

The father was not heir to his deceased wife. There was no estate for him to inherit through her from the grandfather, as he was alive. Even admitting that he was heir to his wife, the letter says nothing about the remittance being an advance to the father as heir.

The only reasonable interpretation that can be given to the expression in the letter: "But as you now as Lina's rightful heir are unconditional disposer and have the right to dispose of it by testament, father only desires the wish expressed that you should apply (invest) and administer this capital entirely according to your will and judgment without allowing yourself to be influenced by any one," etc., is that the grandfather considered the father, as the surviving spouse, the guardian of his daughter's welfare, as his wife had been when living. The sentence, we believe, was used as a synonym to express the power of the father over the daughter, thus impressing upon him that as the guardian of his daughter, her will should be subjected entirely to his own in the disposition of the money. He was to invest the capital, and the use of the interest was left to his discretion to be employed in his household expenses or for the dowry of his daughter. "In any event father expects positively that Carrie, for her own advantage, conform unconditionally to the dispositions of her father." Here is a declaration that in the investment of the money the daughter will not oppose her will to that of her father. This declaration is totally at variance with the dominion which the father would have over the money had it been intended as a donation to him.

Through the whole letter of advice there are expressions which indicate that the remittance was not intended as a donation to the father. The letter exhibits a fear on the part of the grandfather that the money would "slip through the fingers" of his daughter, if she had control of it, and she was not to be made acquainted with the receipt of the money for fear that "flatterers" would despoil her of it.

There is not, as we have said, a syllable in the letter to indicate that the remittance was intended as a donation to the father, except, perhaps, the language quoted "as Lina's rightful heir," etc. This

declaration follows that part of the letter in which the grandfather desires the remittance to be kept secret from "Carrie" for fear of "flatterers," showing, in our opinion, that the grandfather had in his mind the duties which the father, as surviving parent, owed to the daughter, and admonished him of them.

It is argued that the father had taken care of his brother-in-law, an unfortunate brother of the wife, and the grandfather had intimated his pleasure to make compensation. But there is nothing in the letter to show that the remittance was intended as a remunerative donation. If it had been, the donor could not and would not have placed restrictions upon its disposition.

The letter of advice means, in a just interpretation of it, considering its language in connection with the relationship of the parties, that the grandfather remitted the money for his daughter, the capital to be invested for the daughter, and the interest to be at the disposal of the father for household expenses, to defray in part the expenses of the daughter, unless the father saw proper to use it for her as dowry. If there should be a demand upon the father to use a part of the capital for his daughter, a certain part of it, at all events, had to be invested for the daughter.

The letter in the record is a translation, but we doubt not that the original text would more exactly define its meaning, and accord with our interpretation.

The defendant pleads the prescription of ten years. It has no application to the facts in this case. The father was the custodian of the money for his daughter. The prescription could only commence to run from a demand for its return to the daughter, or from a settlement between them. He held the money as a fiduciary.

The daughter does not claim the revenues of the money. The District Judge declined to give judgment decreeing the daughter the owner of the house purchased in the father's name with part of the money, but gave judgment for the amount due, after deducting investments which had been made by the father in the name of his daughter.

Judgment affirmed.

Sciortino vs. Railroad Co.

No. 12,189.

MICHELE SCIORTINO VS. CRESCENT CITY RAILROAD COMPANY.

This case involves a question of fact. The defendants' car injured a child of tender years on its track, and there was an entire absence of negligence on the part of defendants' employees. The accident was unavoidable.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Benjamin Rice Forman and B. R. Forman, Jr., for Plaintiff, Appellant.

Farrar, Jonas & Kruttschnitt and Hewes T. Gurley for Defendants, Appellees.

Argued and submitted November 4, 1896.

Opinion handed down November 16, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. The plaintiff brought this suit to recover of defendants the sum of ten thousand dollars damages, for the use and benefit of his minor child who was injured by defendants' car.

The child was eighteen months old when the injury was inflicted. He was on defendants' track.

The car was going at the rate of five miles an hour. It was forty feet from the child when it was discovered that the child was on the track. It is in evidence that an electric car going at that rate of speed can only be checked or stopped not at less than that distance.

The testimony is that the motorman did everything in his power to avoid injuring the child, after he saw it on the track. A passenger in the car gives the most satisfactory account of the efforts of the motorman to stop the car. There is no contradiction of his testimony. The mother and brother of the child attribute the accident to the fact that the motorman was not looking "straight down," or he would have seen the child in time to avoid the accident, but they say he was looking forward, which was the proper direction for him to view the track.

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51	759
49	7
104	199
104	201

Mortgage Co. Ltd. vs. Ogden, Tutor, et al.

The motorman saw the child about as soon as it was practicable for him to do so, which was about the time the mother saw the child on the track and screamed to the motorman to stop. We are satisfied that the defendant company was in no way negligent, and that the accident was unavoidable.

Judgment affirmed.

No. 12,062.

SCOTTISH AMERICAN MORTGAGE CO., LTD., vs. WM. F. OGDEN,
INDIVIDUALLY AND AS TUTOR, ET. AL.

A party who advances money to a tutor is not bound to go behind the deliberations of a family meeting, and the judgment thereon to inquire into the truth of the facts recited. Nor is he required to follow the destination of the money advanced.

A broker acting for one party in a particular transaction and who induces another party to accept a proposal made by his principal, the party accepting the proposal can not be charged with constructive notice of facts, which if known would make the acceptance a nullity if attacked by the principal making the proposal through the agent.

Where a tutor cultivates for minors their property and petitions for the convening of a family meeting to deliberate upon the borrowing of money for the education and maintenance of the minors, and the meeting advises the borrowing of money which is approved by the judge, the papers on their face, by such recitals, do not disclose the fact that the money to be borrowed is beyond the revenues of the minors. The tutor has the right to cultivate the plantation, and the net proceeds constitute the revenue. It is essential to cultivate the place to create this revenue.

Where the family meeting authorizes the making of ten notes for the money borrowed payable in instalments, and twenty are made, ten being for the interest calculated to maturity with eight per cent. interest from maturity, there is no excess of authority exercised by the tutor, when the transaction shows only the amount authorized to be borrowed was evidenced by the sales, and the separation of interest from principal was, in reality, beneficial to the minors.

The interest notes so drawn, with eight per cent. interest from maturity, do not bear usurious interest. The interest was capitalized.

The family meeting had the authority to provide for brokerage for the negotiation of the loan.

Tutors when they contract in pursuance of the advice of a family meeting and the judgment thereon, must confine themselves within clear and distinct instructions given. The contract gets its binding force from the family meeting. Therefore, in the act of mortgage, when the family meeting did not recommend the waiving of appraisalment, the tutor in the mortgage can not waive it.

Mortgage Co. Ltd. vs. Ogden, Tutor, et al.

A foreign corporation lending money to a resident of this State, through brokers domiciled in Mississippi, do not come within the meaning of Art. 236 of the Constitution.

A PPEAL from the Eighth Judicial District Court for the Parish of Concordia. *Ellis, J.*

Lazarus, Moore & Luce for Plaintiff, Appellee.

John S. Boatner for Defendant, Appellant.

Argued and submitted November 6, 1896.

Opinion handed down November 16, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. In 1882 W. F. Ogden, as tutor of his minor children, had a family meeting convened, and its deliberations were homologated in the interest of the minors.

The meeting advised the borrowing of one hundred and twenty-five thousand dollars, to be secured by mortgage on a plantation owned by the children.

The proceedings convoking the meeting and the deliberations show that the money to be borrowed was for the support and education of the minors.

A mortgage loan was secured in accordance with the recommendation of the meeting and the order of the judge homologating the same.

This mortgage debt was not paid. The tutor in 1883 petitioned for and obtained an order for another family meeting, which was convoked for the sole purpose as urged in the first meeting. The deliberations were approved by the judge. This family meeting recommended the taking up of the first mortgage debt and the borrowing of twelve thousand dollars, and the payment of twelve hundred dollars for brokerage in negotiating the loan, and authorized the execution by the tutor of the mortgage to secure the loan, to be evidenced by ten promissory notes. Francis Smith & Co., who were doing business in Vicksburg, Miss., were selected by the tutor

to negotiate the loan. Their business was that of mortgage brokers, to receive proposals for loans, investigate titles and values of property and the safety of the investment, which they reported to the company or corporation from whom they solicited the money. This company, on the report, either accepted or rejected the loan. In this instance the plaintiff corporation was solicited to make the loan, which was accepted and the mortgage executed, the ten notes for the principal issued and ten notes for interest separately issued.

The mortgage was executed and accepted in Louisiana, and the notes executed in Louisiana, but made payable in Vicksburg. The acceptance of the proposition to loan was made by the company, either in Scotland or in Vicksburg, by the brokers for the company or corporation. It is immaterial for the purposes of this case, where the contract of loan was accepted, so it was beyond the jurisdiction of this State.

The tutor failed to pay all the mortgage indebtedness, and the plaintiff corporation foreclosed its mortgage. The suit was met by an injunction from the children of W. F. Ogden, who were minors when the loan was negotiated and the mortgage executed.

The grounds for the injunction are:

1. That in executing the mortgage the tutor exceeded the authority given to him by the family meeting in executing twenty instead of ten promissory notes, and that the ten interest notes bear 8 per cent. interest from their maturities, thus making compound or usurious interest, and that the act of mortgage contains more onerous stipulations than authorized by the family meeting.

2. That the act of mortgage contained the stipulation that the mortgaged property should be sold without benefit of appraisalment, which was not recommended in the deliberations of the family meeting.

3. That plaintiff in execution is a foreign corporation, and had not complied with Art. 236 of the Constitution, and that the act of mortgage is null and void, having been executed in violation of a prohibitory law.

4. That the minors never received any benefit from the money secured by act of mortgage.

5. That the money borrowed from plaintiff in executory proceedings was obtained for the purpose of paying the debt of their tutor.

6. That there was no consideration for the twelve hundred dollars

authorized by the family meeting to be paid for brokerage, as Smith & Co. were the agents of the plaintiffs.

The lower court dissolved the injunction, except as to that part in reference to the sale without appraisement, and ordered the sale of the property with benefit of appraisement.

The plaintiffs in injunction have appealed. Defendants in same have prayed for an amendment to the judgment, reversing that part of the judgment relating to the sale with appraisement.

The proceedings in both family meetings are regular, and the deliberations were on the facts alleged in the petition for the meeting. The plaintiffs in injunction contend that the money raised on the first mortgage was to pay a debt of the tutor, and the second was but a continuance of the first; the taking up of the debt of the tutor in the first mortgage granted, which was for the purpose of paying the individual debt of the tutor, and that no part of the debt secured by either mortgage inured to the benefit of the minors.

This may be true, but the petition of the tutor and the deliberations of the family meeting emphatically declare that the money to be raised by the mortgage was for the education and maintenance of the minors. The creditor, the party with whom negotiations were opened for the purpose of borrowing the money, was not compelled to institute an investigation beyond the recitals in the proceedings of the family meeting.

The import of their meaning is absolute verity, and there must be something in the proceedings suggesting fraud, or the mortgage creditor must be charged with knowledge of the intent to defraud the minors.

Cane, Tutrix, vs. Cawthon, 32 An. 953.

Gilmer vs. Winter, 47 An. 37.

The creditor can not be made responsible for the funds because he has no control of them. His responsibility ceases after the money has been advanced, and to invalidate the mortgage it is essential that he should have known before the mortgage was executed of the intended diversion of the funds and of the fraud intended to be practised upon the minors. *Id.*

There is no evidence in the record that the mortgage creditor had any knowledge whether the first mortgage was for the individual debt of the tutor, nor is there any evidence charging them with notice that the second mortgage debt was given for any other

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purpose than that stated in the deliberations of the family meeting.

But the plaintiffs in injunction urge that Smith & Co., the agents of the tutor, in negotiating the mortgage were also the agents of the corporation lending the money, and therefore they were constructively charged with notice. In the record there is a power of attorney from the tutor to Francis Smith & Co., specially authorizing them to borrow the money from the plaintiff in executory process. That they were authorized to accept the mortgage, investigate title and value of property for this purpose, would be, on this account, carrying the doctrine of constructive notice to an unreasonable extent. But there is no evidence that Francis Smith & Co. had any knowledge that the money had been raised on the first mortgage to pay the debt of the tutor.

There was nothing in the proceedings of either family meeting to suggest to them that the money was destined for the individual use of the tutor. This point, however, is put at rest by the fact that Smith & Co., mortgage brokers, were the special agents for plaintiffs in injunction, that is, the tutor, and solicited the loan from plaintiffs, and therefore any knowledge the agent had could not be charged to plaintiffs in executory process unless communicated to the lender. *Seixas vs. Citizens Bank*, 38 An. 424.

Article 8017, Civil Code, says the "obligations of the broker are similar to those of an ordinary mandatory, with this difference that his engagement is double and requires that he should observe the same fidelity to all parties, and not favor one more than the other." There is no evidence in the record that the mortgage brokers failed in fidelity to either party. It is certain that a broker acting for one party in a particular transaction, who induces another party to accept a proposal from his principal, that the party so induced to accept the proposition can not be charged with constructive notice of facts which, if known, would make the acceptance of the proposition a nullity if attacked by the principal. This is the condition of this case.

It is urged that the amount borrowed in itself shows that the amount was not for the maintenance and education of the minors, and that it was in excess of their revenues.

Article 346, C. C., says that "if among the property of the minor there be any which it may be necessary to work as a plantation or a

manufactory, the tutor shall not be bound to administer them or cause them to be administered, but he shall be permitted to let them for an annual rent proportioned to their value." Under this article the tutor had authority to cultivate the plantation. It was necessary to have money to cultivate it to raise a revenue for the education and support of the minor. The place not having been leased, the revenues of the minor were evidently to be derived from its cultivation. He had the undoubted right, with the advice of a family meeting, to borrow money for this purpose.

We do not think the tutor exceeded his authority in multiplying the evidences of debt so long as he did not increase the debt or place additional burdens upon the minors. He was authorized to execute ten promissory notes for the amount to be borrowed. He executed ten, payable in instalments for the principal, and ten for the interest, which decreased with each year. This arrangement of the debt was, in our opinion, advantageous, as it provided the convenient payment of interest and thus made it easy to prolong the term of payment with the consent of the mortgage creditor. At any rate no injury was done to the minors. The interest notes were made to draw interest at the rate of eight per cent. after maturity.

It is true that the interest of eight per cent. is on the interest. But the same would be true if the interest had been capitalized and added to the principal debt, and eight per cent. interest had been made payable on the notes after maturity. In both instances the interest is capitalized, which brings this case under the provisions of Art. 2924 of the Civil Code. *Martin vs. Sheriff*, 37 An. 763.

The family meeting authorized the payment of brokerage commissions to amount of twelve thousand dollars. It is not likely that the amount authorized to be borrowed could have been obtained without the intervention of a broker. It would have been competent for the stipulation of the commission by a capacitated person.

In the case just cited this court said: "The legal object and the legal effect of the authority conferred by the law to tutors, when advised and empowered thereto by a competent court, under the advice of a family meeting, to perform certain contracts for and in the name of the minors entrusted to their charge, are to assimilate such contracts in every particular to the acts of persons of full age."

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As an incident to the borrowing of the money the services of a broker were deemed necessary by the family meeting. They advised the employment of one and the payment of the commission. It was within the limits of their power and to the advantage of the minors. The contract would be legal by one of full age. It is, therefore, legal on the part of the tutor, acting for and on behalf of the minors, who, for that particular contract, were authorized through their tutor as though they had attained majority.

Tutors, when they contract in pursuance of deliberations of a family meeting, must confine themselves within the clear and well-defined instructions given. The contract gets its binding force from the family meeting. Any departure from the recommendation inflicting the least injury upon the minors, or waiving any right they may have, is as though it had never been entered into, and is of no effect. The family meeting did not recommend a sale without benefit of appraisalment.

This stipulation in the mortgage is null and void. That the minors or some of them have since attained majority, and made no objection, until proceedings were instituted against them, can not have the effect of making this stipulation valid. It was such an agreement, not authorized, and never entered into by them that they could resist its attempted enforcement at any time.

The record shows that Smith & Co. were mortgage brokers, with an office in the city of Vicksburg, Miss.; that they were employed by the tutor to negotiate the loan authorized by the family meeting; that they borrowed the money for the tutor from the plaintiff corporation, and that this corporation in a foreign jurisdiction accepted the security tendered and made the loan. The act of mortgage was executed in this State, and also the notes, but they were payable in Vicksburg. The salient fact is that the proposition was to a foreign corporation to advance the money, and it accepted, as its domicile, thus making the contract to advance, an agreement entered into beyond the jurisdictional limits of this State. In other words, it was a foreign corporation lending money to a citizen of Louisiana through brokers, agents of the borrower, in Vicksburg.

This case can scarcely be distinguished from that of *Reeves vs. Harper*, 43 An. 521. In that case we said: "It would be a gross injustice to the people of Louisiana were we to hold that the Constitution denied them the privilege of borrowing money outside of the

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State from foreign corporations, and securing the loans by mortgage of their property in this State."

The prescription pleaded by defendants in executory process was interrupted by an authentic act executed by the tutor.

Judgment affirmed.

No. 12,226.

STATE OF LOUISIANA VS. OCTAVE THIBODAUX.

49	15
48	1596
49	15
123	614

The jury law of 1894 authorizes a trial judge, when, in his discretion, he thinks it necessary and proper, to require the jury commission to select additional jurors for service, either as regular jurors or as talesmen, and they shall be summoned without delay, or within such time as the judge may indicate; and in interpreting a similar law, this court held this to be a proper exercise of legislative authority, and a sound public policy.

In a motion for new trial only such matters can be availed of as shall have transpired during the progress of the prosecution, and its refusal because of alleged nullities in the proceedings not adverted to during the trial, nor brought to the attention of the jury, will not be reviewed by this court.

The use of the words "then and there" in an indictment for perjury are not so sacramental that they should appear in exact conjunction therein, and being separately employed in the same sentence of the portion of the information charging the taking of the false oath, it will be deemed sufficient.

In such an indictment it is not essential that the authority and jurisdiction of the court administering the oath should be expressly averred if they sufficiently appear from the facts set forth, and when the presentation for perjury is in the same court in which the perjury was committed, it may take judicial cognizance of its own jurisdiction if the indictment sufficiently sets forth the facts.

A PPEAL from the Eleventh Judicial District Court for the Parish of Acadia. *Dupré, J.*

M. J. Cunningham, Attorney General, and *R. Lee Garland*, District Attorney, for Plaintiff, Appellee.

Philip S. Pugh for Defendant, Appellant.

Submitted on briefs November 7, 1896.

Opinion handed down November 15, 1896.

Rehearing refused January 4, 1897.

State vs. Thibodeaux.

The opinion of the court was delivered by

WATKINS, J. Having been convicted of the crime of perjury and sentenced to hard labor in the penitentiary for a term of five years, the defendant has appealed.

The grounds upon which his counsel relies are the following, as extracted from his brief, viz.:

"The defendant relies for a reversal on the following points:

"1. That the jury which tried him was unlawfully constituted, because the panel from which it was drawn was illegally constituted, for the reason that the judge and the jury commissioners had neither power nor authority under the law to draw a panel in the middle of the term.

"2. That the motion for a new trial should have been sustained, for the proceedings in which the perjury was alleged to have been committed had been declared absolutely null and void by the Supreme Court, and that, under the law, no conviction of perjury could lie in a prosecution which had been finally terminated by a decision of that character.

"3. That the indictment is fatally defective in not alleging that the oath was taken before an officer *having authority to administer oaths*, as required by law, and that the time and place where the oath was administered was not described by the use of the technical words 'then and there.'"

The charge of perjury consists in a certain alleged false statement made in a matter material to the issue in the cause entitled State of Louisiana vs. Octave Thibodeaux *et als.*, the present defendant and Auguste Thibodeaux being therein jointly indicted with the murder of Hugh Geiger—the homicide having been caused by the wrecking of a train on the Midland Branch of the Southern Pacific Railroad connecting with Eunice.

On the first trial of said cause the defendant is alleged to have sworn that he was present at the wrecking of said train, whereas at a subsequent trial of the same cause he swore as a witness to an exactly contrary statement, viz.: that he was not present but was at his own home.

I.

Preliminarily, the defendant's counsel filed a motion to quash the venire of jurors drawn from the third week of the term, and challenged the array for the following reasons, to-wit:

"That on the 17th of June, 1896, the court ordered the drawing of a jury panel for the fourth week of the term, the week for which they were drawn being the following week, commencing June 22, 1896," and that the drawing of said jury was *ultra vires* and void, for the reason that the jury commissioners had no power or authority under the law to draw said panel, and that if the defendant is tried before a jury drawn from said panel it will result to his great injury, and that any verdict or sentence thereunder rendered would be likewise illegal and void.

"That Sec. 6 of Act 89 of 1894, under which the panel was apparently drawn, contains no provision under which same could be legally drawn."

The trial judge overruled the motion to quash on the ground that Sec. 6 of Act 89 of 1894 authorized the drawing of the jury as it was done, and that a like statute was so interpreted by this court in *State vs. Wright*, 41 An. 600.

The section of the statute referred to is of the following tenor, viz.:

"That whenever the District Judge thinks proper he shall require the jury commission to select additional jurors for service, either as regular jurors or as talesmen, and they may be summoned without delay, or within the time the judge requires," etc.

In disposing of a similar motion to quash the array we said in the case above cited, that "as a matter of public policy the Legislature saw fit to authorize the judge during the term, when he deemed it necessary, to order the additional jurors."

There is practically no distinction between the two statutes. The motion to quash the array is not well taken.

II.

The motion for new trial is chiefly directed to the effect of the annulment of the judgment and sentence pronounced in the case of *State vs. Thibodeaux*, in which the perjury of the defendant is assigned, same having been annulled and reversed by the decree of this court. And the point is made in the motion that, under the law and settled jurisprudence, no conviction of perjury could lie upon testimony given in the course of a prosecution which was subsequently declared null and void.

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There was no objection made to the indictment on that ground, and no testimony tendered in the course of the trial tending to establish the nullity of the aforesaid judgment.

Whether the perjury was committed in a prosecution which was subsequently annulled by a decree of this court, on account of an invalid indictment, was a question of fact for the jury to determine; and upon administration of proof upon the subject on behalf of the defendant, it would have become the duty of the trial judge to have charged the jury upon that subject.

But the record discloses that no proof was adduced upon that subject before the jury, and it does not appear that this question was mooted in their presence. Consequently, it was not disposed of by the verdict of the jury.

It seems evident to our minds that some objection should have been interposed at the trial to the introduction of testimony on behalf of the State, or an effort made by defendant to bring to the attention of the jury the alleged nullity of the judgment and sentence in the case of State vs. Thibodeaux (48 An. 600) as affecting the present prosecution for perjury.

For it is elementary that a jury can pass upon nothing but evidence in disposing of a criminal case; and it is equally plain that the trial judge is powerless to grant relief upon a motion for new trial, except for causes arising in the course of the prosecution.

But counsel insist that as a matter of law, it was the duty of the trial judge to have taken cognizance of the evidence—the record and opinion of this court which were introduced on the trial of the motion—and finding the verdict and judgment to have been annulled, and declared absolutely void, he should have granted a new trial to have afforded the defendant relief.

Reviewing the authorities we find the trend of them just the other way.

Mr. Wharton says:

“ A suit which is actually void and null for want of jurisdiction, or other incurable defects, is not one in which perjury can be committed. But if the proceedings are merely voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if such false evidence could by any contingency be introduced as testimony.” 2 Wharton's Crim. Law, Secs. 2225, 2212; 2 Bishop's Crim. Law, Sec. 1028.

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Now it appears that the verdict and judgment in *State vs. Thibodeaux* were annulled and reversed because of an illegality in the drawing of the grand jury by whom the indictment was found. There was no want of jurisdiction of the court, or informality in the indictment. Our decree annulled the verdict and sentence, and "re-manded the case to be proceeded with according to law."

State vs. Thibodeaux, 48 An. 600. The motion was properly refused.

III.

The defendant's motion in arrest of judgment assigns, that the information is fatally defective in not setting out specifically that the defendant did "then and there" before the Hon. W. C. Perrault, presiding judge, take his corporal oath—the information simply employing the word "then" only. And that said information is further fatally defective in not setting forth that the defendant was sworn by an officer, or by any one having authority to administer oaths—same being absolutely essential to the validity of the information.

The information contains the following declaration, viz.:

"On the twenty-seventh day of June, A. D. 1895, a certain issue was joined in the Eleventh Judicial District Court of Louisiana in a certain action wherein the State of Louisiana was plaintiff, and Octave Thibodeaux and others were defendants; and that afterward, to-wit, on the day and year aforesaid, at the sitting of said court in and for the said parish of Acadia, the Hon. W. C. Perrault, presiding judge, that said issue came on to be tried, and was *there* tried in due form of law by a jury of the said parish of Acadia, in that behalf duly taken and sworn between the said parties; and upon the said trial, upon the issue aforesaid, one Octave Thibodeaux did *then* appear and was produced as a witness in his own behalf and in behalf of his co-defendants on trial of the issue aforesaid, and the said Octave Thibodeaux did *then*, before the Hon. W. C. Perrault, presiding judge as aforesaid, take his corporal oath and was *then* duly sworn," etc.

Now, while it does not appear that the words "then and there"—and which defendant's counsel insists are sacramental—were conjunctively used in the information, yet they were both employed separately in the same sentence of the information. For instance:

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"Said issue came on to be tried and was *there* tried in due form of law;" and "upon the said trial upon the issue aforesaid, one Octave Thibodeaux did *then*, before the Hon. W. C. Perrault, presiding judge as aforesaid, take his corporal oath and was *then* duly sworn," etc.

In our opinion the quoted language of the information suffices and fulfils the requirements of the law.

Upon the next proposition there appears to be even less difficulty, as it clearly appears that the case of State vs. Thibodeaux, in which the perjury is assigned, and the instant case were both tried before the same court, the same judge presiding at the trial of both cases. And from the foregoing extract from the information it fully appears that defendant was charged with having taken his corporal oath and being duly sworn "before the Hon. W. C. Perrault, presiding judge."

The alleged false oath having been taken before, or in the presence of the presiding judge, in open court, same was a judicial oath; and it has been settled by adjudications of this court and the opinions of text writers that when perjury is assigned on a judicial oath, it is sufficient that the person acting is one of a class of officers having *prima facie* authority, and does administer the oath with due formality and solemnity, in the presence of the court, it having jurisdiction of the proceedings. State vs. Dreifus, 38 An. 877.

In the absence of formal averment, that the court in which the false oath is alleged to have been taken had competent authority (R. S., Sec. 858), it has been held sufficient that the jurisdiction and authority of the court fully and substantially appear from the facts set out in the indictment. State vs. Schlessinger, 38 An. 584; 2 Bishop, Criminal Practice, Sec. 914.

In the case cited we said:

"If a court may take judicial notice of anything, surely it may do so of its own jurisdiction in a case which was pending before itself."

And in the immediate succeeding case we repeated and emphasized what was said in Schlessinger's case, employing this language, viz.:

"That, in an indictment for perjury, it is not essential that the authority and jurisdiction of the court administering the oath should be expressly averred, if they sufficiently appear from the facts set out; that when the presentation for perjury is in the same court in which the perjury was committed, it may take judicial cognizance of

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its own jurisdiction, if the indictment sufficiently sets forth the facts," etc. State vs. Grover, 38 An. 567.

The foregoing decisions appear to have solved the proposition contended for by defendant's counsel, unfavorably to his pretension.

To such a case as is here presented, the provisions of Revised Statutes, Sec. 858, does not apply.

There is discoverable in the proceedings no serious charge of error, and the defendant is entitled to no relief at our hands.

Judgment affirmed.

No. 12,200.

GEORGE MEYERS VS. ILLINOIS CENTRAL RAILROAD CO.

A railroad company having had transient cars of other companies in its use or employment regularly inspected, condemned and ordered to be sent to its shops for repairs, and had them properly tagged so as to warn its employees of that fact, has not fully discharged its obligation of due care toward one engaged in the performance of night service as a car coupler unless the tags are of such a size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact.

49	21
50	728
49	21
52	1114
49	21
108	366

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

F. M. Gill, for Plaintiff, Appellee.

Farrar, Leake & Lemle, for Defendant, Appellant.

Argued and submitted on November 5, 1896.

Opinion handed down November 16, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

WATKINS, J. This suit is for the recovery of fifteen thousand dollars damages for personal injuries sustained by the plaintiff, whose left arm was crushed while engaged in coupling an oil tank car to an ordinary freight car in the defendant's government yard in the city of New Orleans at 1:05 A. M., on the 31st of July, 1895.

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On the trial there was a verdict of the jury in favor of the plaintiff for five thousand dollars and the defendant has appealed. The defendant's counsel filed a motion for a new trial on the ground that the verdict of the jury is clearly contrary to the law and the evidence, but the judge *a quo* declined to grant it on the ground that, during the twenty years he had occupied the bench, he could not "recall a single instance where the second trial, or even the third verdict, differed materially from the preceding one. * * * It is of interest to the republic that there shall be an end of litigation."

In this court the plaintiff and appellee has filed an answer to the appeal, and prays that the amount awarded be increased to fifteen thousand dollars, as originally claimed.

The averments of the petition are substantially that, being engaged as an employee of the defendant "as freight car coupler," and, in consequence of having his arm crushed while engaged in coupling defendant's cars, it was necessarily amputated just below the elbow.

The charge of fault and negligence on which he rests his claim to damages are as follows, viz.:

"The machinery and appliances of the freight car were worn and defective, the draft timbers broken, and the drawhead gave way and went under the car; and the bumper of the oil tank car, on the right side of the train, came in contact with the deadwood of the freight car, to which petitioner was to couple the same, causing the aforesaid casualty.

"That said casualty occurred in the city of New Orleans, in the government yard of said company, on the old main line, and continuation of Calliope street, about half a mile beyond the site of the old depot.

"Petitioner is informed and believes, and so alleges, that on or about the 26th of July, 1895, said freight car and its machinery and appliances had been inspected, condemned and ordered to the shops by the inspector of said company."

His petition then particularizes the defects in said freight car and the causes of the accident thus, viz.:

"That said freight car was without grab-irons, or hand-holds, not only usual and necessary but required for the greater security of the men in coupling and uncoupling cars, and for the prevention of all

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accidents. That it was dark and no light to guide petitioner save that of a small lantern held by himself.”

Petitioner avers that he was guilty of no fault, but that the afore-said injury and damage were occasioned solely by the worn and defective machinery and lack of requisite appliances, and by the gross carelessness, fault, negligence and want of skill on the part of the defendant, its officers and agents.

Defendant’s answer avers that plaintiff was not injured through the negligence of its officers or agents, but, on the contrary, that any injury he suffered while he was engaged in coupling its cars was solely due to his own negligence and want of due care.

It specially denies that plaintiff suffered any injury on account of the want of hand-holds or grab-irons on the said cars, or that said alleged injury was caused by the want of proper light. That if said cars were defective or unfit for service, or had been examined, condemned and ordered to be sent to the shops, such fact or defect was patent upon the cars themselves, and if plaintiff had used his sense of sight he would have had full knowledge thereof. But that if such was not the case the defendant’s answer shows that the “plaintiff, by taking employment in (its) service, assumed the risks incident thereto.”

The facts gleaned from the record are substantially as follows, viz.:

At 1:05 A. M. of the night of the 31st of July, 1895, the plaintiff and another employee of the defendant were engaged as switchmen in coupling cars in the government yard; and whilst thus employed in coupling a box car of the Richmond & Danville Railroad Company No. 1406, to an American Cotton Oil Company’s car No. 521, the accident happened to the plaintiff. The R. & D. car was attached with other cars to a locomotive which was, at the time, slowly moving, while the A. C. O. car was stationary.

The plaintiff is a professional switchman and car-coupler, and had been employed as such, for many years by the Louisville & Nashville and Northeastern Railroad Companies, prior to his employment in that service by the defendant a few months since.

He had assigned to him a night watch, which was the occasion of his being engaged in coupling cars at the hour of 1:05 A. M.; and the only light afforded him was that of a small lamp, which he customarily carried in his hand or under his arm while thus employed.

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This service may be deemed hazardous and consequently dangerous, requiring the exercise of skill and care on the part of employees; and it may be correctly assumed that such employees take the risk of such dangers as are necessarily and commonly incident thereto.

Appertaining to the accident and the cause of it, the plaintiff as a witness states, that in attempting to make the aforesaid coupling, he took a position on the right side of the track, coupling with his left arm; and the drawhead closing in, the bumper caught his arm and mashed it, so that it had to be amputated.

Explaining further he states, that draft timbers are used for the purpose of holding the drawhead in position so that the coupling of the cars can be effected. That one of the draft timbers is placed on one side of the drawhead, and one on the other.

That they are made of wood, 4x6 generally, and about three feet in length. The deadwood is the block on top of the drawhead.

On this occasion he says the draft timbers gave way, and consequently the drawhead dropped down and went under the A. C. O. car and missed the coupling, and the bumper caught his arm and crushed it. That his arm was caught between the deadwood of the R. & D. car and the bumper of the A. C. O. car. That the bumpers are so placed as to save the car coupler from getting hurt. That he attempted to make the coupling by setting the pin on the A. C. O. car, which was standing still, and when that car and the R. & D. car came together he threw the link upward to catch the pin and complete the coupling. That the pin did not fall when he threw his hand up, and the cars came together so quick that he did not have time to get his arm out. Says he had set the pin in the oil tank car, and held his lantern in his right hand and threw the link of the R. & D. car up as it approached, with his left hand, but the pin would not drop, as it was fast in the hole; but he could not say what caused it.

He affirms that if the drawhead of the R. & D. car had been in good condition, in his opinion the latter and the bumper of the oil tank car would not have come together.

Another employee of the defendant says that when the moving car is slacking up to a stationary car for a coupling and the drawheads meet each other, there is a spring which gives way slightly, so as to allow them to meet gently, but that the bumpers do not come together.

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That it is impossible for a man to couple the cars when they come together to any extent.

Another of plaintiff's witnesses, and an employee of the defendant as foreman of the switch gang in the government yard, states that he saw and examined the cars in question on the morning of the accident at about the hour of eight o'clock.

"Q. What was the condition of the R. & D. car, No. 1406?

"A. It was shopped; it was on the shop track; and, also, a tank car next to it. The draft timber on the south end of the car and on the up-town side was smashed and broken in, and that allowed the drawhead to go in from its place—the draft timber being smashed."

States that the drawhead of the R. & D. car had gone in some three or four inches, out of its regular position for coupling; that this permitted the deadwood and the bumper to come together.

Another of defendant's witnesses, and an employee of the defendant as inspector of freight cars, states that he was in the service of the company at the time of plaintiff's accident, and was engaged in inspecting cars in defendant's government yard. States that on the 26th, previous to the happening of the accident on the 31st of July, 1895, he examined and condemned R. & D. car No. 1406, and ordered it sent to the shop for repairs, and prepared and placed upon it a shop-card marked "Shop O. D.," with this further endorsement, viz.: "R. & D. 1406, D. bolts and D. timb. B-K." He explains this last endorsement to mean, "draft bolts and draft timber broken." He states that the writing on the card is his own, and that, at the same time, he made the following entry in his memorandum book, which he identified, viz.:

"1406 R. D. One deadwood and one draft timber, two draw sills split. One draft timber broken, and one draft timber split and broken. One draft timber strap gone. Four draft bolts broken."

The testimony of several witnesses supports the statement of the last witness with regard to the posting of a shop card on the R. & D. car, notwithstanding the plaintiff's denial of any knowledge of its existence.

But conceding the fact, that the R. & D. car had been previously examined and condemned as unfit for service in the particulars that are enumerated, and that an appropriate card had been prepared and posted, the fact remains that the appliances for the coupling of

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the cars were badly broken and in a very crippled condition, and wholly unsuitable for use, to the knowledge of the company, and had been for five days prior to the date of the accident.

There is no doubt of the fact that these broken and defective appliances was the proximate and immediate cause of the accident and of plaintiff's injury, and the question to be solved is whether plaintiff had due and proper notice of the aforesaid defects, or could, by the exercise of proper care and caution, have ascertained their existence and avoided the accident.

In our opinion the plaintiff did not have proper notification of the defects in the draft timbers which caused the accident. The weight of the evidence supports the proposition that in the then condition of the draft timbers a coupling of the cars was a practical impossibility. That the broken and split draft timbers failed to hold the drawhead of the R. & D. car in a proper position, and consequently when it approached the A. C. O. car the pin in the latter refused to drop into its place, thus preventing the coupling of the two cars.

Accepting this theory it seems quite apparent that there was no mode of escape for the plaintiff other than to have declined the attempt to make the coupling at all, and this he affirms he would have done had he been advised of the true situation.

One of the witnesses says that, in his opinion, the accident could have been avoided by making the coupling *underneath* the drawhead—holding the link *under* the car. But he does not say that this is an usual or customary manner of making a coupling, and no other witness affirms that proposition; and no witness undertakes to affirm that the plaintiff was unskilful or careless in the performance of his duties.

Conceding that the shop card was properly posted and endorsed, and that this was full and complete warning to all switchmen and car-couplers that the R. & D. car was disabled and unfit for service, it did not convey notice of the existence of broken and split draft timbers which rendered the coupling extra hazardous, if not well nigh impossible.

An inspection of the original shop-card, which was brought up with the transcript in the original, discloses that the endorsement thereon, viz.: "No. 1408 D. Bolts, and D. timb. B. K." are written with a pencil, and very indistinctly; so much so that the characters

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can not be readily deciphered, except by the aid of explanatory testimony. To our thinking, if the plaintiff had been sufficiently an expert in that line to have deciphered them with ease—which, however, is not shown—it was a physical impossibility for him to have done so, with the aid of the light of a small lamp to dispel the darkness, and on the spur of the moment, the car slowly approaching.

It seems to us to be perfectly clear, that the duty was imposed upon the defendant during the five days which intervened between the date of inspection and that of the accident, to have taken some better means than those employed, to warn its employees on a night watch of the danger that existed in attempting to couple this R. & D. car, notwithstanding it was in its government yard and destined to the shop for repairs.

The facts of this case bring it fairly within the principles announced in *Towns vs. Railroad Company*, 37 An. 680, which involved quite a similar question of damages for personal injury suffered by the plaintiff's son while engaged in coupling idle cars on the company's track.

In stating the law applicable to such a case the court said that the controlling weight of authority consecrates the principle "that while the railroad company is not the insurer of its employees and is not necessarily bound to employ the best possible means and appliances, it is bound to exercise reasonable and ordinary care to provide such suitable and safe apparatus as common experience shows to be proper in order to avoid exposing the lives of their employees to unnecessary danger in the discharge of their hazardous duties."

Now while the cars in question did not belong to the defendant in the sense of property, they were in its government yard, and had been inspected and condemned by its inspector and tagged for its shop for repairs. And while it was under no duty to see to it that they were furnished with proper appliances for coupling, it was under an obligation to properly and sufficiently forewarn its employees and car couplers who were employed in night service, of the hazard and peril there was in coupling them in their then defective and unsafe condition.

The case of *Britton vs. Railway Company*, 47 Minn. 340, is applicable also. *Olairain vs. Telegraph Company*, 40 An. 178.

In *Myhan vs. Electric Light Company*, 41 An. 964, we said that "the servant is not required to know latent, but only patent defects.

Actual knowledge must be established by the master, on whom rests the burden of proof."

In *Hough vs. Railway Company*, 100 U. S. 218, the Supreme Court said the obligation is on "the master not to expose the servant when conducting his business, to the perils or hazards against which they may be guarded by proper diligence upon his part."

The distinction between the instant case and that of *Railroad Co. vs. Bowles*, 71 Mississippi, 1003, is found in this, that in the latter case it was found as a fact, that the cars to be coupled "were without drawheads and *chained together*;" and this fact was appreciable on casual inspection, as the accident did not occur at night.

The two cases are easily differenced by the instructions the defendant's counsel requested the judge to give to the jury, but which was refused, viz.:

"That plaintiff could not recover if Bowles knew of the defective condition of the cars that killed him and voluntarily exposed himself to danger; that if he was careless, and guilty of contributory negligence, causing injury, plaintiff could not recover" (p. 1005).

And so in *Arnold vs. Canal Company*, 125 N. Y. 15, it was said:

"In attempting to couple the cars, one of which had a broken drawhead, in order that the latter might be placed on the (cripple) track, plaintiff was injured. The defect might easily have been seen."

In *Goodrich vs. Railroad Company*, 116 N. Y. 398, the court said that "plaintiff, a brakeman in defendant's employ, while engaged in coupling a car received from another road to cars on defendant's track, was injured. In an action to recover damages it appeared that the accident resulted from the fact that the bumper of the said car was out of order so that it hung lower than the one of the car to which it was being coupled. *Held*: That the company was chargeable with negligence."

In that case no inspection and condemnation of the foreign cars had been made so as to relieve defendant from the obligation of care to defendant's employees; but had such an inspection and condemnation been made, as was done by the defendant in this case, the defendant in that case would not have relieved itself from responsibility without taking adequate means to advise its employees of the existing defects.

Having given all the authorities cited due consideration, under

Railway Co. vs. Railroad Co.

the facts we have related, our opinion is that defendant is chargeable with negligence, and consequently responsible in damages to the plaintiff.

The plaintiff is a comparatively young man of thirty or thirty-five years of age, and has the prospect of twenty-five or thirty years longer to live. At the time of the accident he was in excellent health, and by means of his avocation was earning \$2.50 per day, or an average of \$65 per month of twenty-six working days, or \$750 per annum. By reason of this accident he suffered great pain and his left arm was amputated just below the elbow, thus rendering him incapable of performing the duties of his avocation. He is and has been since the accident out of employment, and has an aged mother dependent on his exertions for support.

We are of opinion that the award of the jury is correct and should remain undisturbed.

Judgment affirmed.

No. 12,280.

THE KANSAS CITY, SHREVEPORT & GULF RAILWAY COMPANY VS.
THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY.

The court recognizes that property in use by a railroad company, whether acquired by expropriation or purchase, can not be expropriated by another without legislative directions, either expressly or by necessary implication; but in this case the court finds no such use. Cooley Constitutional Limitations, page 589; 1st Woods Railway Law, Sec. 229; 43 Conn. 234; 62 Mich. 564.

The necessity to the expropriating railroad corporations of the land proposed to be taken is to be understood in a reasonable sense with due regard to the needs of the corporation, hence the directness of the route, the character of the ground, facilities of construction, with other elements of judicious selection and certainly the ordinance designating the right of way of the corporations are appropriate guides exercising in their right of expropriation Lewis on Eminent Domain, Sec. 267; 82 Ala. 297; 39th Eng. & Am. Railway Cases, p. 13.

APPEAL from the First Judicial District Court for the Parish of Caddo, Land, J.

Alexander & Blanchard and Thomas C. Barrett for Plaintiff, Appellee.

F. P. Stubbs (Harry H. Hall, of Counsel), for Defendant, Appellant.

49	29
51	824
51	825
51	1000
51	1013
49	29
112	915
112	920

49	29
115	333

49	29
1125	762

Argued and submitted December 1, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

MILLER J., The defendants appeal from the judgment, decreeing the expropriation of defendants' land for plaintiffs' use.

The petition alleges the construction in part by plaintiffs of a railroad from Kansas City to the Gulf, by way of Shreveport; that under agreement with that city, plaintiffs have established their machine shops and have agreed to build a depot within the city limits, for which purpose the company has acquired the necessary site; it is further averred that the land sought to be expropriated is necessary for the construction of the road through and from Shreveport and to connect with the company's depots, and with this averment of the necessity of the land for plaintiffs' road, there is the allegation the land is not required for the defendants' uses. The exception and answer of the defendants deny the necessity alleged for the expropriation, avers the land is part of defendants' right of way for their railroad, is necessary for the transaction of its business; and that held already under the expropriation by defendant, no second expropriation is authorized. The jury found the issues of fact in plaintiffs' favor and assessed the land, damages and betterments at three thousand three hundred and eighty-five dollars, and the judgment following the verdict decreed the payment of that amount to defendants. The plaintiff paid the amount into court, proceeded with the construction of their road over the land and defendants prosecuted this appeal. R. S. S. 1479, 1483.

The plaintiffs' road under the franchises given by the ordinance of the council of Shreveport is to be constructed from the point of access on a line connecting with the site of its depot, and continuing to the front street of the city, Commerce street, on which the company's tracks already are laid. The defendants' tracks have been laid for years on a part of the line prescribed for plaintiffs' road by the city ordinances; that is to say, between Murphy and Common streets, are laid on land acquired by defendants many years ago, and by the ordinance conferring on plaintiffs their franchise for connecting lines in Shreveport, the tracks of plaintiffs' road are required to be laid alongside of defendants' tracks, to block nine, i. e., the

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depot ground of plaintiffs. This space between Murphy and Common streets awarded to the plaintiffs, is about three thousand feet, or as the verdict gives it two and sixty-one one-hundredths acres, and is a part of the larger space from seventy-five to one hundred and fifty feet wide owned by defendants. On this space defendants had but one track on which it had conducted its business for the years since it acquired the property and laid its tracks. In advance of any expropriation proceedings the plaintiffs had caused to be surveyed the space it deemed requisite, for its uses, about thirty-five feet wide on the southeast side and alongside of defendants' tracks, leaving still left to defendants considerable space on that side, and while there is some conflict of testimony, we think it is shown, that on the northwest side there is room for another track, and by filling cuts or "fills" still another track might be laid on defendants' land. As soon, however, as plaintiffs had surveyed on the southeast side, defendants commenced the construction on that side of a siding track, and afterward completed it. The plaintiffs, thereupon, proceeded to survey the space they required further east still on defendants' land and within the line prescribed by the ordinance, *i. e.*, alongside defendants' tracks. This second line of plaintiffs required all the defendants' land on that side, and indeed, necessitated the acquisition of other land by plaintiffs. About the time of the beginning or completion of defendants' siding on the east side, there were negotiations between the parties of the land plaintiffs required, or for the lease of the siding track. The defendants demanded twenty-five thousand dollars for that the jury assessed at thirty-three hundred dollars. Plaintiffs refused to accede to the demand and resorted to this expropriation proceeding.

There is in the record a mass of testimony offered to show the feasibility of procuring land for plaintiffs' uses without taking that of defendants, and that defendants will need the land. On the other hand, there is an equal mass of testimony controverting that of defendants'.

All property is held subject to the right of eminent domain. One of the conditions of that right is the public necessity for which expropriation is demanded. 2 Kent, p. 338 *et seq.*; Cooley's Constitutional Limitations, pp. 528-530 *et seq.*; Constitution of Louisiana, Art. 156; Revised Statutes, Sec. 2376 *et seq.* No question is made that the need of land for constructing requisite connections of plain-

Railway Co. vs. Railroad Co.

tiffs' railroad is a public purpose or necessity in legal contemplation. The defendants' appreciation of that necessity, seems to make the test whether or not the land of others, equally adapted as they contend for plaintiffs' uses, can not be obtained. All the testimony seems to concede that the locality in which this land is sought to be taken is within the scope of prudent choice, but it is defendants' contention that land a short distance away from their property should be expropriated. Both roads running through the city of Shreveport have chosen routes over the locality in controversy. We understand the ground is "broken by chasms of hills," to use the term in the record. While defendants' testimony is to the effect that plaintiffs can find land as good for their purpose within, say, two hundred feet, or a few hundred feet away from that alongside of defendants' tracks, the testimony of plaintiffs' witnesses is that to go further east or south would be to encounter deeper fills or chasms, and greater difficulties and expense of construction. It is to be observed that defendants in making their selection of a roadbed through the city avoided the fills and other difficulties to which they insist plaintiffs should submit. We have, too, on this question of the fitness of the land for plaintiff's purpose, the ordinance of the council prescribing the line alongside of defendants' tracks, and the verdict of the jury to be deemed an approval of that line. We think, the fair conclusion from all this, is that alongside of defendants' tracks, as specified in the ordinance, is better suited for plaintiff's uses than any land in the *radius* indicated by defendants' testimony. While we have examined this phase of the controversy, it must seem difficult to maintain, as the test of expropriation, that land of others than the proprietor should be taken. Expropriation, in most instances, is deemed a sacrifice by the proprietor called on to make the surrender. If one proprietor could defeat the expropriation on the ground that the call should be made on another, the supposed compulsion of the law requiring private property for the public good would be of no efficacy.

The necessity in legal contemplation that is to be the guide in selecting land for an unquestioned public purpose is to be understood in a reasonable sense. There is, of course, the prohibition of excessive appropriation or the taking of any land not within the scope of the purpose required. Cooley's Constitutional Limitations, 539

et seq.; New Orleans Pacific Railway Company vs. Gay, 32 An. 471. Subject to these restrictions the law permits the expropriation of property with due regard to the wants of the expropriating company, measured by the points between which the railroad connection is to be made; the facilities for construction afforded by the ground; the directness of the route and other points naturally involved in the selection of a roadbed. The question, then, is whether in expropriating, the taking of defendants' land is within this reasonable exercise of the power. It is of weight on this branch of the case, that defendants, for their route through the city from Red river, chose their roadbed on the same line to the extent involved in this controversy that plaintiffs select for their road through the city. While one road goes through the city, from the river north-east to southwest—that is the general direction, the other proceeds through the city from southwest to the river. Each chooses for part of their lines the space under discussion enough for both tracks. The judgment of defendants is that the City Council and the verdict of the jury all confirm the selection by plaintiffs as a judicious exercise of choice, if expropriation gives the power to take that which is reasonably required. If to all this is added the fact that the plaintiffs can have no right of way through the city without the consent of the authorities, and seek only that prescribed by the ordinance, it seems to us that the expropriation sought conforms not only with a reasonable exercise of the power, but is constrained by the exigency of the ordinance of the Council. If the right to expropriate the land that is needful for the public purpose carries the limitation of a prudent exercise of the right, the courts must enforce the limitation, but can apply only the tests that are suggested by a due regard to the wants of the expropriating company, and the reasonable fitness of the land to meet such wants. These tests, we think, the record furnishes in support of the expropriation demanded.

The defendants, however, claim their land is now in public use under the expropriation for that use, and they contend that no second expropriation is authorized. We find no evidence of any expropriation by the defendants. There is no question that this right of eminent domain extends to property already expropriated. When that purpose is announced it is simply the expression of the legislative judgment that the last public use last proposed is of

greater importance than that to which the property is at the time devoted. But as a rule of interpretation the expropriation of property in public use, whether under a previous expropriation or other mode of acquisition, will not be deemed the purpose of a legislative act unless that purpose is avowed expressly or by necessary implication. Lewis on Eminent Domain, 287 *et seq.*; 62 Michigan, p. 564. The question then is whether the land, the subject of this controversy, is in public use. If not, it is subject to be taken for such use the same as that of any individual. If a corporation acquires more land than it requires for its uses, the land not needed is impressed with no immunity from the exercise of that power, to which all must submit. The land involved in this case, part and a small part only of a larger space, was acquired by purchase in 1858. In all that long period the defendant has had but one single track on the land. They added another when the plaintiffs manifested their purpose to lay its tracks alongside of defendants. With neither track of defendants does this expropriation propose the least interference. The land proposed to be taken is further east and devoted to no use whatever by defendant, nor had it ever been in the half century of defendant's ownership.

There is, however, a great deal of testimony devoted to uses of the defendants for this land not exhibited in the past, nor manifest at present, but which defendants claim the future will develop. In this connection we have gone through the testimony of the negotiation of defendants with a railroad company seeking a connection with Shreveport. The issue of this negotiation it was hoped, the witnesses tell us, would have increased defendant's business, necessitating more tracks on their land, but we observe the negotiation came to nothing. Then we have dealt with that part of the record referring to negotiations by defendants with parties in Jefferson, Texas, west of Shreveport, promising an extension of defendants' line to Jefferson, and this extension the witnesses claim would have accumulated business for the road, requiring more trackage. The record shows this negotiation failed, and we note that defendants have extended the lease of their short track west of Shreveport to the company who have had that lease for years, an extension not in keeping with the Jefferson project. It is also claimed that additional land will be required for yard purposes, which we suppose means space to receive on deposit cotton or freight brought or to be car-

Railway Co. vs. Railroad Co.

ried by defendant's road, but it appears that space for that purpose has been found elsewhere, and certainly no portion of the thirty-five feet sought by plaintiffs has ever been called in requisition for yard or any other purposes. Along with the testimony as to their prospective uses, we have that of other witnesses, some connected with other railroads leading to Shreveport, familiar as they claim with the requirements of defendants' road in the past and qualified to predict any such necessity apt to arise in the future. Without recapitulating it is enough that this speculative testimony as to the future needs of defendants for more land, is at least, as strong against, as for the defendants. We appreciate that in estimating the land of defendants liable to expropriation, that in actual use should not be the rigid limit, but there should be a reasonable regard for probable increased wants of the owner. But in this case we are confronted with the fact, that one track has amply served defendants for years; that it has laid another and has space left reasonably sufficient, if there is any force in testimony, for additional tracks or other purposes. With the tracks on that space, and space besides, it does seem to us difficult, on any reasonable ground of necessity for defendants' uses, to exclude plaintiffs from the thirty-five feet they seek of defendants' comparatively much larger extent of ground. It seems to us, we must accept the conclusion there is ample ground for both roads, and hence no room for one to deny the expropriation sought by the other. The right of expropriation in such case was well applied in 82 Ala. We have considered in this connection the authorities cited by defendants against demands by one corporation for the land of another company. These authorities, arrayed in great number, affirm a principle of general acceptance and may be dealt with generally. They held, in substance, that the land in public use by one corporation can not, without legislative authority, in express terms or arising from necessary implication, be taken by another corporation. There can be no controversy about that. Thus, as those authorities maintain, grave yards are shielded from expropriation. A nearer illustration to this case are the station houses or depots of a railroad company, and so again ground in use for the purposes of a seaside railroad, though not used for tracks or depots. 122 Pennsylvania State, p. 511; 68 N. Y. 326; and other similar types of authority. But here there is no such use, nor any reasonable prob-

 Stroebel vs. Seeger.

ability of future use, if testimony is to guide us, or if possible uses can be invoked at all. An impressive fact too, on this part of the case, that seeks to uphold the alleged use by defendants, and necessity for their needs of this strip of thirty-five feet, is their offer to sell for an amount in striking contrast with that awarded by the jury. We can not resist the suggestiveness of the testimony on this point. An expropriation can not be declined merely on the ground of price to be paid. The price is left to the jury and the courts, and in this, our conclusion is, was all that defendants could reasonably ask.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

 No. 12,159.

WILLIAM STROEBEL VS. GUSTAVE SEEGER.

49	36
50	44

A tax title executed in conformity with law carries the presumption of its validity.
Constitution, Article 210.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

W. R. Richardson and Jos. F. Walton for Plaintiff, Appellee.

R. H. Downing and J. Boyd Grinage for Defendant, Appellant.

Submitted on briefs December 19, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from a judgment condemning him to take the title to property acquired by the plaintiff by an adjudication to him by the State tax collector to satisfy unpaid taxes of the State, the adjudication having been made under the Act No. 82 of 1884.

The defendant assigns no objection to the title, save that it is derived from this adjudication of the State Tax Collector.

Succession vs. Improvement Co.

These titles carry a presumption in their favor which must be accepted in the absence of any contrary proof. No such proof is administered.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed.

No. 12,185.

49 37
111 779

SUCCESSION OF ROGGE, P. F. NOUVET, EXECUTOR, vs. MUNICIPAL IMPROVEMENT COMPANY.

The rule was to compel the adjudicatee to comply with his bid and take title.

Presumably, the property was the property of the community.

The evidence that it was paraphernal property was not of such a convincing character as to make it appear that the title was not suggestive of litigation.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

John L. Peytavin for Executor, Plaintiff in Rule, Appellant, and
J. N. Augustin and *W. J. Waguespack* for Intervenors, Appellees.

Carroll & Carroll for Defendant in Rule, Appellee.

Argued and submitted December, 16, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

BREAUX, J. The plaintiff took a rule upon the defendant to compel the latter to comply with the terms of an adjudication of property of the succession of Christina M. Rogge.

At the date of her death, Mrs. Christina M. Rogge, wife of C. William Rogge was domiciled in Biloxi in the State of Mississippi.

She left a will in which she named the plaintiff as her testamentary executor. The succession was opened in Harrison county, Mississippi, also in the Civil District Court of this city.

The plaintiff obtained an order for the sale of the property involved in this litigation.

The property was adjudicated to the defendant.

Succession vs. Improvement Co.

The defendant, as set forth in the return to the rule, refused to take title.

The facts preceding the adjudication, regarding the title, are that Christina M. Rogge bought the property June 18, 1889. She was at the time the wife of William Rogge, who did not join in nor sign the deed of sale to the wife. He had abandoned her at the time.

When Mrs. Rogge was married to Wm. Rogge, she was the owner of property worth about fifty thousand dollars. She had funds sufficient to pay for the property, if she chose to make the purchase in her own name. The act of purchase, however, contains no declaration that the wife bought the property with her paraphernal funds. She declares in the act that she did not know where her husband was and that she has instituted suit against him for a divorce. The record reveals that this suit was afterward dismissed on account of defective pleading. Some time after this dismissal and after she had acquired the property she brought a second suit for a divorce, and a judgment of divorce was granted to her.

During the trial of the rule before us for determination the plaintiff in rule made Rogge a party to the proceeding. The rule, on mover's motion, was discontinued as to Rogge, and trial of the rule was proceeded with contradictorily with the defendant and adjudicatee alone.

The evidence discloses that the surviving husband, Rogge, sued the succession of the late Mrs. Rogge, and alleged that the property was community property. He was examined as a witness upon the trial of the rule. He, in substance, asserted as a witness that it was community property.

The record discloses that in Mississippi property bought by the husband or the wife is his or her individual property. The law of community of acquets is not known.

Judgment was rendered in favor of the defendant in rule, and the plaintiff has appealed therefrom.

The community begins from the day of the marriage, and is dissolved by death, divorce, separation from bed and board and separation of property.

Here the action for a divorce was brought by the wife during the community existing between the husband and the wife, and the community was dissolved by a judgment decreeing the divorce sued for some time after the property had been bought by one of the spouses.

Succession vs. Improvement Co.

It follows, the property having been bought during the marriage, presumably it was a community asset.

With reference to immovable property, whether it was bought in the name of the wife or the husband, or in the name of the wife alone, it is property of the community. It is incumbent upon the spouse who claims that the property is separate to prove that it is not property of the community. If he fails to procure sufficient proof, by that fact alone the property remains community asset.

The principal question presented for determination is whether the adjudicatee can be made to take title, although it is not established contradictorily with the husband that the property was the property of the wife.

The adjudicatee is a third person who can not be compelled to comply with the terms of adjudication unless the presumption which makes the property a community asset has been effectually destroyed. *Bachino vs. Costa*, 35 An. 570.

The vendor should tender to the adjudicatee a title free from risks and not one subject to attack.

It is next urged by the plaintiff, that the presumption that the property is community property may be destroyed by written or oral testimony. In our view, that presumption is not destroyed in this case.

We were led to consider the merits of the controversy between the husband and his wife's succession.

The case under consideration involves a title suggestive of litigation.

Rogge was put on the witness stand. He neither absolutely admitted or directly denied that the property was the paraphernal property of his deceased wife. At several points of his testimony he contradicted himself.

He testified that his wife had ample means to buy the property, and that he did not furnish the funds. At another time, while testifying, he was anxious to create the impression that he had furnished his wife with considerable sums of money. The testimony, taken as a whole, was certainly not an absolute admission in favor of the wife's succession.

The testimony, which, to say the least, was equivocal, taken with the fact that he had brought an action against the plaintiff here to have it decreed that the property belonged to the community, was enough to raise a serious question as to the validity of the title.

It was not shown with legal certainty that the property claimed, acquired during the community, was purchased with her separate funds.

The proposition of plaintiff, that all purchases made by the wife in the intermediate time between the demand for a divorce and the judgment granting the separation must be considered as having been made for her own account and not for the community, does not impress us.

The suit for a divorce pending when Mrs. Rogge made the purchase was dismissed. The date of any retroactive effect is that of the filing of the petition on which judgment was rendered, and not the date of the filing of the petition of the first suit, which was dismissed.

The record reveals that in Mississippi a bill for a divorce dismissed has no legal effect; it is as if no bill had been filed. A dismissal suit in Louisiana, also, in a case for divorce, can have no such effect as here claimed in matter of property bought for the community or for either of the spouses.

The facts that the domicile of the wife was in Mississippi and that she retained the management of her affairs are not determinative of the issues. The property remains in the community until it is proven that it is not the property of the community, notwithstanding the fact that the spouse by whom it was bought was a resident of the State of Mississippi.

It is settled by many decisions that immovable property in this State must be administered and disposed of under its laws, without regard to the domicile of the owner. Such property, on the dissolution of the marriage, must be distributed according to the laws of the State in which it is situated.

Now, with reference to the administration of the property retained it is urged by the wife during the marriage; it does not justify the conclusion, of itself, that the property bought is her paraphernal property. It is not enough that she had the administration; it must be shown that the purchase was made with her separate funds. A fact not established with certainty required as against an adjudicatee called upon to take a title.

We do not decide that the title is in the community. We only conclude, in the present condition of the case (chiefly caused by contradictory testimony and the fact in addition that the husband is

Soniat vs. Supple et als.

not a party, and that he is actually suing to have the property decreed property of the community), that the title is not one that the purchaser is bound to accept.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,814.

LEONCE M. SONIAT VS. THOMAS SUPPLE ET ALS.

Evidence, such as to drainage of a plantation, the location of ditches and fences, which go to show the character of a plantation as to its divisibility in kind, is receivable.

The other matters are of fact, whether the plantation could be divided in kind.

A PPEAL from the Fourteenth Judicial District Court for the Parish of Iberville. *Talbot, J.*

Hébert & Hébert for Plaintiff, Appellee.

Sims & Gondran for Defendants, Appellants.

Argued and submitted December 15, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. This is a suit for the partition of the Zacharie plantation in the parish of Iberville.

The issue presented is whether it can be divided in kind. The defendants have consolidated their interests so as to make the place, if divisible in kind, into four lots. There was judgment below ordering a partition by licitation. The defendants appealed.

The plaintiff is described as having a front on the Mississippi river of about five arpents, and in the rear of about nine arpents. Its average is four hundred and eighty-five 50-100 acres, and each lot, if the place were divided, would contain one hundred and twenty-one and one-quarter acres. It is impracticable to divide it lengthwise, but it could be divided into four equal parts from the longest

sides. The facts to be ascertained then are, could such a division be made without deteriorating greatly the value of the place and causing loss and inconvenience to the coproprietors.

Evidence was offered as to the drainage and the fences and objected to by defendants. This evidence was offered for the purpose of showing the actual condition of the place and the obstacles in the way of a division in kind. The evidence was admissible. Every fact ought to be received in evidence which shows the character and condition of the place, its surroundings, in order to determine whether or not it can be divided in kind, so as to avoid loss and inconvenience. The plantation is cultivated in sugar cane. This kind of cultivation requires the best drainage and its cost is considerable. The evidence discloses that the main drainage is on the upper side of the place. Those acquiring lots along this drainage would have the more valuable lots, but upon them would be imposed the burden of keeping the drainage up along the entire length of the place. Those acquiring property in the rear, while they would have a right to reach the drainage canal by the natural flow of the water, would necessarily have to cut new drainage ditches to meet the changed conditions caused by the division. A fence also has to be kept along the sides of the place, and this would impose a burden upon those acquiring front lots. The acres, according to locality, are estimated from forty to sixty dollars per acre. The land is pretty much of the same character, but there are only two hundred and fifty acres in cultivation out of three hundred and seventy-five cleared lands, and the southwest corner cultivated by proper reclamation from its swampy condition. The remainder of the plantation is in woods, to the rear of the place.

There are buildings scattered over the place; the dwelling worth say six hundred dollars, and the cabins and other buildings from fifteen to twenty dollars. The lots, with buildings on them, falling to those who drew them, would require a return in money, together with the value of the lot over and above the others. Some would get wood land, others none, and those fortunate enough to draw the lots, which would be near or contiguous to the village of Dorceyville, would be in possession of a part of the place, far in excess of the value of the other lots, as the lots could be subdivided and sold to a great advantage. If the whole place were divided into four equal parts, and then subdivided, we learn from the evidence that

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the subdivisions would be valued according to whether they fronted on the road, or the upper side, or were back of the front lots. There is a plantation road running through the place. This would, or probably would, divide some of the lots and depreciate their value.

Altogether we are of opinion that a division in kind would cause great loss and inconvenience to the coproprietors. While the defendants are willing to take chances of all inconveniences and losses, we do not think that a like condition should be imposed upon plaintiffs.

Judgment affirmed.

No. 12,140.

BLUEFIELDS BANANA COMPANY VS. BOARD OF ASSESSORS AND
CITY OF NEW ORLEANS.

A foreign corporation had an agent here, where it received and where it sold fruit and received the price for the same. Part of the proceeds were withheld in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent; also, for the prosecution of its business here and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans precisely as did resident business men and firms.

Held: An assessment of the cash in bank of said corporation is proper and warranted by the provisions of Act 105 of 1830, an act to provide an annual revenue for the State. The rule *mobilia sequuntur personam* is a fiction of the law, not resting of itself upon any constitutional foundation, and which gives way before express law.

A PEAL from the Civil District Court for the Parish of Orleans,
Monroe, J.

Ivy G. Kittredge for Plaintiff, Appellee.

F. C. Zacharie for Tax Assessor and Tax Collector, Defendants,
Appellants.

Argued and submitted December 17, 1896.

Opinion handed down January 4, 1897.

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49 1175

49 43
51 1032
49 43
52 1331

49 43
107 96

49 43
115 705
e115 707
e115 709

49 43
e121 114
e121 133

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Plaintiff alleges itself to be a corporation incorporated under the laws of the State of Texas, and domiciled therein in the city of Galveston.

It represents that in the month of January or February, 1894, or thereabouts, and also in January or February, 1895, or thereabouts, the Board of Assessors for the parish of Orleans assessed it for the sum of five thousand dollars as cash in bank.

That it is a foreign corporation; that it has no property of any description subject to be assessed or taxed in the State of Louisiana; that it was never subject, in person or property, to the jurisdiction of the Board of Assessors, or bound in any manner to observe or note its illegal action in their regard; that said pretended assessment is illegal, null and void; that the State Tax Collector for the second district of of the city of New Orleans and the city of New Orleans are endeavoring, on the claim that said assessment is legal, to collect the taxes based thereon and threaten to levy upon debts and credits belonging to it; that it is entitled to have said assessment canceled and annulled and to have the State Tax Collector and the city of New Orleans restrained from collecting the taxes based thereon.

It prayed for and obtained a writ of injunction.

There was judgment for plaintiff and defendant appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The State tax sought to be levied is seventy-six dollars on movable or personal property. It is assessed and levied under Act 106 of 1890. The portions of the sections embracing the tax are as follows: Sec. 1 " * * * all movable property and chattels, all personal property, all goods, wares and merchandise, and other stocks in trade in possession, on hand and under control; * * * all property held, controlled or administered in each separate capacity, as president, cashier, treasurer, liquidator, assignee, master, superintendent, manager, sequestrator, receiver, trustee, stakeholder, depositary, warehouseman, keeper, curator, tutor, executor, administrator, legatee, heir, beneficiary, father, *agent*, attorney, usufructuary, *mandatory*, fiduciary or official capacity." * * * (The italics are our own.)

" This enumeration shall not be construed so as to exempt from

Banana Co. vs. Board of Assessors.

taxation any property or values not enumerated herein." Sec. 7. "It is made the duty of the tax assessors throughout the State to place upon the list all property subject to taxation, including merchandise or stock in trade on hand at the date of listing within their respective districts or parishes; * * * provided further, that in assessing mercantile firms, the true intent and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average on the capital, both cash and credit, employed in the business of the party or parties to be assessed. *All this shall apply with equal force to any person or persons representing business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident, either by himself, or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared assessable within this State, and at the business domicile of said non-resident, his agent or representative.*" (The italics are our own.)

The plaintiff is a Texas corporation. Louis Ivy testified: A part of its business is conducted in the city of New Orleans through the firm of John Wilson & Co. The company exported fruit from Spanish America to the United States for sale. The fruit was brought to New Orleans and there sold by the agents of the company, and the money was placed there to their credit in the Mutual National Bank and the Hibernia National Bank. The only funds which the company had at the time of the assessments were the deposits. When debts and obligations of the company in New Orleans fell due they were paid by checks on these two banks drawn by the witness (Ivy), its book-keeper, who held a power of attorney so to do. He was the financial agent of the firm. He received checks, greenbacks and silver in the ordinary current business for the proceeds of the sale of the importations, and it was his rule to deposit them in the banks to the credit of the company as soon as he could. He at times received money for the company from Wilson & Co., who sold their stock for them. He received checks, except for the small local trade, which probably amounted to three hundred dollars a month. He generally put out moneys through checks, sometimes paid from money he had in hand before the bank

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closed. He rarely had on hand outside of the bank more than twenty-five dollars in silver. If he did it was because he received it after the bank was closed and it was too late to deposit it, and he could not do so until the next day. The largest amount was cash two hundred and seventy dollars, held for a day or two in the desk in the office until he could deposit it. He kept on hand, outside of the banks, an average of about twenty-five dollars a day to pay for telegrams, incidentals and all small amounts too small to draw a check for. If there was any surplus money in New Orleans it was at the command of the Galveston company.

The company chartered vessels in New York on voyages between New York and Galveston. The company instructed him to pay the charter money in New Orleans, the amount of the same being about "two thousand dollars a month." Plaintiff relies upon the proposition that moneys belonging to a foreign corporation, deposited to its credit in the banks of New Orleans, are mere credits—that they are personal property having no *situs* other than that of their owner, and are, therefore, not taxable in Louisiana. That it is a matter of no moment whether the corporation does business in New Orleans, and the deposits represent moneys derived from sales made there of fruit in the prosecution of its business. It relies upon the cases of the Liverpool, London and Globe Insurance Co. vs The Board of Assessors, 44 An. 765, and Gleason & Co. vs. The City of New Orleans, 45 An. 1.

On the part of the defendants it is contended that the State for the purposes of taxation may give a *situs* to personal property tangible or intangible, distinct from the domicile of the owner, provided it does not violate the inhibition of the State and Federal Constitutions; that while deposits in a bank to the credit of a foreign corporation are not taxable away from the domicile of the owner, as laid down in the 44th Annual (764-768) and 46th Annual (1), yet where such bank deposits are under the control of a resident agent who administers them and draws them out in whole or in part in the business of his principal, they can be taxed at the domicile of the resident agent. They cite the American and English Encyclopedia of Law, Vol. 25, page 125, and authorities in note 1, on page 127; 21 Vermont 152; 45 Missouri, 600; Brown vs. Houston, 114 U. S. 622; Cooley on Taxation, 2d Ed., 23; Welty on Assessments, Sec. 80, p. 42; 57 Bar. (N. Y.) 356; 23 N. Y. 440; 19 Kas. 415; 69 Mo.

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457; Am. and Eng. Ency. of Law, Vol. 25, p. 138, and authorities in note 8; 44 An. 765; 66 How. Pr. 190; 4 Blatch. U. S. 263.

In the brief for the State counsel say: "That the fruit imported, or its proceeds in cash, was tangible property, can not be successfully denied. To say that these proceeds were immediately deposited in bank to the credit of this foreign corporation and thereby became a credit of the corporation and passed beyond the power of the State, will not answer. The taxing power attached to the fruit and subsequently to its proceeds in money regardless of what disposition was made of the money. No such shifty evasion of the law of this sort can be tolerated. The plaintiff company has regular selling agents here who sell their fruit and turn their proceeds over to their agent, who holds a bank power of attorney. The latter deposits it in bank, has the bank book, draws checks and disburses all money for this foreign corporation. This condition of affairs makes another exception to the rule *mobilia sequuntur personam*."

In Insurance Company vs. The Board of Assessors, 44 An. 768, we said: "The evidence showed that plaintiff had no money loaned on interest nor bills receivable for money loaned, nor credits for goods sold. The issue was limited to credits for premiums due, but the evidence showed that it had 'money in possession;' that that was property within the State, subject to taxation. It was visible and tangible, and expressly made taxable by statute, and is taxable where situated."

In Railroad vs. The Board of Assessors, 44 An. 768, the court again said: "The plaintiffs, at no time, had money loaned on interest, none in possession on deposit or on hand, and none due for goods sold." The issue was as in the case of the London, Liverpool and Globe Insurance Company, the taxability of credits due for uncollected premiums.

The decision in Clason & Co. vs. The City of New Orleans, 46 An. 1, rested upon the special facts of that particular case. The plaintiff was a foreign firm, having its domicile in Manchester, England. In one sense of the word, it did business in New Orleans; that is, it made purchases of cotton through an agent residing in that city. Its business was exclusively that of a purchaser. The cotton was not held in New Orleans for resale, for manufacture or for traffic of any kind, but was purchased for immediate export.

The funds with which the cotton was bought were really funds of

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the purchasers in Manchester, subject to be drawn against there to operate payments. The moneys on deposit in bank in that case, represented the price of the property bought, and were placed there simply as a convenience for the purpose of enabling the parties to make use of commercial instrumentalities as facilities for making immediate payments.

If foreign merchants were subjected to taxation on moneys sent here simply for payment of the price of property bought for immediate export, some of which, in all probability, merely passed *in transitu* through the State for shipment, and some of which presumptively had been already taxed, it was very obvious that the trade of the city of New Orleans would be very seriously and injuriously affected unless the parties, by a mere shifting of their mode of doing business and making payments, should avoid the tax. The court did not think it was justified in assuming that it was the intention of the Legislature (even if it were authorized so to do) that moneys in bank, deposited here for the special purpose of paying for cotton bought for immediate export to Europe, should be taxed.

The case is different here. The foreign corporation had an agent here, where it received and where it sold fruit and received the price for the same. Part of the proceeds were withheld in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent. Also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans precisely as did resident business men and firms. It received all the advantages to be derived from the State and city governments which residents received, and we see no reason why it should not be taxed, as claimed in this proceeding, unless there be insuperable legal objections in the way. We find a statute of the State, which by its terms brings them under the operation of State and city taxation, and we are bound to give effect to its provisions unless they be in derogation of the Constitution. The unconstitutionality of the act is not pleaded, and we, of ourselves, see no unconstitutional features in it. The rule *mobilia sequuntur personam* is a fiction of the law, not resting of itself upon any constitutional foundation, and which gives way before express laws, destroying it in any given case where constitutional requirements themselves do not stand in the way.

Railroad Co. vs. Construction Co.

It is said that the taxation provided for can not be made effective. Whether this be true or not we can not say, but if true, the difficulties in the way of the execution of the law does not furnish a test as to its constitutionality.

We are of the opinion that the judgment appealed from is erroneous.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed.

It is now ordered, adjudged and decreed that the injunction issued herein be set aside and that plaintiff's demand be rejected with costs in both courts.

No. 12,206.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY VS. THE
LOUISIANA CONSTRUCTION COMPANY.

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104	57
49	49
1124	74
1124	79

No matter how serious the complaints are in a petition, unless the prayer asks for relief by a proper judgment under proper procedure, the suit will be dismissed, on the plea of no cause of action.

A PPEAL from the Civil District Court for the Parish of Orleans.
Elie, J.

Harry H. Hall for Plaintiff, Appellee.

J. R. Beckwith for Defendant, Appellant.

Argued and submitted December 18, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

McENERY, J. The city of New Orleans granted to the plaintiff corporation wharfage rights, for its own use, the free landing of vessels engaged in carrying to said wharves passengers and freight destined to be transported over its lines—from Port to Montegut streets. The petition recites the ordinances under which it acquired said wharf privileges and the fact that it had constructed wharves,

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expended money on the faith of the grant, and that it had constructed tracks and sheds and established stations along the line designated for the use of the corporation.

The petition further recites that "in spite of the special contractual exemption aforesaid, and in spite of the fact that petitioner's wharves and landings are not embraced in said lease or contract of the said Louisiana Construction and Improvement Company, the said company, illegally and without warrant of law, asserts its rights to collect and has collected and is collecting from vessels lying at petitioner's said wharves and landing levee and wharf dues at the rates specified in said lease for the use of the city wharves not exempt from said charges."

"Petitioner avers that in order to retain the business of vessels landing at its wharves, and which vessels are offered free wharfage by other railroad companies in the city of New Orleans, petitioner has been compelled to guarantee and has guaranteed to the owners of said vessels that no wharf or levee dues will be collected from those vessels occupying and lying at or using petitioner's wharves by its consent and on petitioner's business.

"That in order to avoid the issuance of Admiralty process against said vessels, petitioner has been compelled to pay and is paying such wharf and levee charges to the said Louisiana Construction and Improvement Company, under protest however, and with notice to it that it denies the right or legality of such charges and that it will sue to recover back the same, that it has illegally exacted from petitioner.

"Petitioner avers that its interest herein in maintaining the exemption of its said wharves from levee and wharf dues as aforesaid largely exceeds the sum of ten thousand dollars. An averment is made that should this court hold that the defendant company, under its contract with the city, could collect wharf and levee dues from vessels lying at petitioner's wharves, with its consent and on its own business, that it would be the impairing of the obligation of petitioner's contract and contrary to the Constitution of the United States. After making the city of New Orleans a party and praying for citation on defendant, the relief prayed for is as follows: That "there be judgment in favor of petitioner and against defendants decreeing that the Louisiana Construction and Improvement Company is not warranted in law and can not legally collect levee or

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wharf dues from any vessels lying at or using the wharves of the New Orleans & Northeastern Railroad Company on the Mississippi river between Port and Montegut streets, said vessels being on the business of said company and at said wharves with its consent; and further, decreeing that all vessels occupying or lying at said wharves discharging or receiving cargo thereat with the consent of petitioner and on the business of petitioner shall be exempt from payment of all levee or wharf dues; " and concludes with a prayer for general relief. There was an amended petition filed, elaborating, but not changing materially the averments in the original petition.

An exception of no cause of action was filed and overruled, and on a trial on the merits there was judgment for the plaintiff.

The exception of no cause of action should have been maintained.

There is no prayer for a money judgment against defendants, no demand for the ownership or the possession of any property. Nor is there any demand for any writ by which petitioner's rights could be preserved, or any demand for the issuing of an injunction by which the wrongs complained of could be prevented. There are serious grievances and complaints, but no redress prayed for. We have ordinances of the city of New Orleans and contracts thereon submitted to us, in which rights of plaintiff and the defendant company apparently conflict, and we are asked to decree that the defendant abstain from asserting a right claimed by it under its contract. Our decree, if the prayer were granted, would be simply that the plaintiff corporation is right in its interpretation of the ordinances of the city in its favor and its contracts thereunder. We would thus interpret and construe a contract, without the power to enforce our decree, unaided by a restraining order. The suit is in its nature hypothetical; the submission to us of an abstract proposition. We do not mean to say that the complaints are not serious. They are of sufficient gravity to warrant a suit in the proper procedure.

The judgment appealed from is avoided and reversed, and it is now ordered and decreed that plaintiff's suit be dismissed as in case of non-suit, plaintiff to pay all costs.

State ex rel. Dobson vs. Justice.

No. 12,352.

STATE EX REL. HENRY G. DOBSON vs. E. F. NEWMAN, JUSTICE OF
THE PEACE.

One single cause of action can not be split up and divided into a multiplicity of suits for the purpose of defeating the jurisdiction of the court to which the action jurisdictionally belongs; and that, if it be thus divided and the multiplicity of suits be consecutively filed in a court not constitutionally endowed with jurisdiction of the whole sum, or entire cause of action, same will be treated as one single suit, and our writ of prohibition will go to the judge of the court entertaining the suits and arrest their further progress.

ON APPLICATION for Writs of Prohibition.

Thomas O. Benton for Relator.

Respondent Judge *pro se*.

Stubbs & Russell for Golson Brothers, Respondents.

Submitted on briefs December 19, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

WATKINS, J. The relator's claim to relief is predicated on the following state of facts, viz.:

That the commercial firm of L. D. & G. T. Golson, doing business in the city of Monroe, within the jurisdiction of the respondent, Newman, filed in his court, simultaneously, seventeen suits having the consecutive numbers 115 to 131 inclusive, against him (the relator), each one of said suits being for the sum of ten dollars and aggregating one hundred and seventy dollars, an amount in excess of the jurisdiction of his court.

That these several suits are based upon open accounts of ten dollars each, dated on seventeen consecutive days, and all filed in respondent Newman's court on the same day, the 10th of November, 1896—same being identical in every respect except as to date, as

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will be shown by reference to the copies of the several citations that are annexed to his petition for reference.

That the plaintiffs in said suits have but one cause of action, but they have been illegally, unjustly, maliciously and oppressively divided into seventeen different suits in order to avoid and evade the jurisdiction of the District Court and to deprive him (relator) of his legal right of appeal, to multiply the costs against him in favor of the respondent justice of the peace, and to "bring the courts of the State into contempt by making them the instruments of oppression, petty spite and vengeance."

That the respondent justice of the peace has no jurisdiction of the cause of action of said suitors, L. D. & G. T. Golson, and is not competent to entertain and decide same, thus illegally divided into seventeen different suits.

That he filed pleas to the jurisdiction of the justice of the peace in each of said seventeen different suits, but same were overruled; and that he (relator) subsequently applied to the judge of the Fifth Judicial District, for a writ of prohibition, and same was by him refused because the relief demanded was not in aid of his *appellate* jurisdiction—the several amounts being only ten dollars each.

The purport of the return of the respondents, making common cause, is, that Golson Brothers were and are engaged as green grocers, selling in the city of Monroe fish, oysters, fowl, eggs and game; and have been deriving a lucrative business for two years past in the stalls of the public market of that city, which they rented from the farmer or lessee thereof, paying in advance and daily the rent charge for same, as fixed by city ordinance governing said market.

That during the summer of 1896, the relator became the lessee of said market, to whom said Golson Brothers applied for the lease of certain stalls in which to conduct and operate their said business; but this privilege was by him arbitrarily and peremptorily refused, notwithstanding they made him a lawful tender of the full amount of the fees, he (relator) was entitled to demand and receive.

That on account of relator's refusal to lease Golson Brothers a stall, they were compelled to sell their goods away from the market; and, on that account, he (relator) caused them to be arrested for violating the city market ordinance which prohibited the sale of such articles at other places than the public market place.

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That respondents, Golson Brothers, repeated their tenders and demands daily, for the rent of stalls for a number of days, but without avail; and they continued to make their sales as aforesaid for a number of days, continuously, and were just as frequently and continuously arrested and fined for the same for seventeen consecutive days.

"That the persistent and malicious refusal of said (relator) Dobson to accept the rental from day to day as tendered inflicted a daily loss on respondents (Golson Brothers) each day, independent of the other, the damage each day being caused by the refusal on that particular day; and that while the course pursued by (relator) Dobson, a public servant or functionary, was clearly vindictive and malicious, there was no other way whatever by which he could be brought to an appreciation of the daily wrongs and injustices he was inflicting on respondents (than) by reminders in a court where the law's delays would be duly available in the *minimum*. And (that) it was only after the trial of two suits, and the filing and service of seventeen other cases, of which (the relator) now complains, that he saw his duty as a *quasi*-public officer and accepted the tender on the 11th of November, 1896, and permitted respondents (Golson Brothers) after tedious and expensive delays, to resume their business.

"That each day's tender of rent by respondents (Golson Brothers) and the peremptory and unreasonable refusal thereof by Dobson, was a distinct and separate cause of action; and while respondents, if they had seen proper, might have cumulated their several causes of action into one suit, they were not aware of any provision of law which required them so to do, and they therefore adopted the plan which in their judgment would soonest bring Dolson, market lessee, to a sense of his ridiculous attitude and relieve them from his malicious and unwarranted impediment to the exercise of their usual calling.

"That the persistent and malicious refusal, each day, by Dobson, relator, to permit (Golson Brothers) respondents to pursue, legally, their chosen business, was a separate and distinct cause of action—each a *quasi*-offence against the rights of respondents."

The case may be said to fairly stand upon the foregoing synopsis of the petition and return, as the exemplifications from the records of the respondent justice of the peace annexed thereto fully sub-

stantiate same, and there is, practically, no difference between the two.

In the brief of relator's counsel it is stated that at the public letting of the market the respondents (Golson Brothers) were unsuccessful competitors of the relators, and that when they subsequently demanded the right to rent a stall, it was refused upon the ground that the lessee was prohibited from renting to them because they are in arrears to the city on account of their former lease.

Counsel also attracts our attention to the fact that relator was not only supported by the city charter and ordinances in the position relator had assumed, but, further, to the fact that the lease of a stall in the market was a *continuing* one, for a fixed and definite period of time, notwithstanding the dues therefor were payable daily by the lessees thereof.

The question tersely stated is, whether the respondents, Golson Brothers, had several different causes of action, suable separately, or only one cause of action which could be properly determined in one suit.

A casual inspection of the return of respondents, as indicated in the foregoing extracts therefrom, will plainly show that the cause of action stated is one *ex delicto* for damages alleged to have resulted from the refusal of relator to lease them a market stall; and it is equally plain that it constitutes but a single indivisible cause of action, notwithstanding the right to lease a stall was demanded by them on seventeen consecutive days, and said demand was met by as many consecutive refusals by the relator.

For all practical purposes, one single demand, accompanied by an appropriate tender, was enough; and if his right be conceded to repeat the demands to the number of seventeen they might, with equal propriety, have been continued indefinitely.

But we need not go outside of the respondents, Golson Brothers return, for the *gravamen* of the dispute which superinduced and controlled their proceedings and animated them in the course they pursued, for it says "that while the course pursued by Dobson, a public servant and functionary, was clearly vindictive and malicious, there was no other way whatever (by which) he could be brought to an appreciation of the daily wrongs and injustices he was inflicting on (them) than by reminders in a court where the law's delays would be only available in the minimum."

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And again: "That it was only after the trial of two suits (previously filed) and the *filing and service of seventeen other cases* of which (the relator now complains) that he saw his duty as a *quasi-public officer*, and accepted the tender, on the 11th day of November, 1896, and permitted them, after tedious and expensive delays, to resume their business," styling the relator's conduct a *quasi-offence*.

Taken altogether, it is quite evident that this multiplicity of small suits for unappealable amounts, instituted in the court of the respondent justice of the peace, was resorted to by the other respondents, Golson Brothers, for the purpose of inflicting a punishment upon the relator, and that the intended purpose had been thereby, in a great measure, accomplished.

Can a series of small suits, thus contrived and designed, be recognized and sustained as jurisdictional?

In *Reynolds & Henry Construction Company vs. Mayor and City Council of Monroe*, 47 An. 1289, it was held that a creditor "will not be permitted to divide his claim and sue the defendant in instalments."

In *State ex rel. Rosetta Gravel Paving and Improvement Company vs. Judges*, 47 An. 1301, it was held that "when several suits, identical in every respect, are filed for the purpose of obtaining the allotment of one to a certain division of the Civil District Court, the first assignment of one will carry the others to the same division, as there is but *one case* in fact and in law."

In *French vs. Landis*, 12 Robinson, 633, the court said:

"But it is clear that the action can not be divided, and a part sued for in that case and a part in this. If judgment were rendered against the defendant in that case, for the sum demanded as damages for malfeasance in office, we think it clear it could be pleaded in bar to the present action founded on the same cause." O. P. 335.

In *State ex rel. Schoenhausen vs. Judge*, 47 An. 701, we made a writ of prohibition peremptory against the respondent for having exceeded the bounds of his jurisdiction in having sentenced the relator to several distinct and different periods of punishment for several distinct and different contempts of his court in having disobeyed his order of injunction on several different consecutive days, the opinion employing these words, viz.:

"If it is competent to divide the offence of conducting a saloon in

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disregard of the law, into parts corresponding with the number of nights the saloon has been opened, and thus authorize eight sentences of ten days each, propounded at the same time on eight different rules, there could be no potency in the law fixing the *maximum* penalty for contempt at ten days' imprisonment. The same theory of dividing the offence into parts might be extended to the hours of the days of opening, treating each hour as a distinct offence, and thus sanction an indefinite and prolonged imprisonment, notwithstanding the limitation of ten days in the Code."

Like principles were stated and sustained in *State ex rel. Garvey et al. vs. Whitaker*, Recorder, 48 An. 528, wherein a city recorder was restrained by a writ of prohibition from entertaining jurisdiction and maintaining against the relators a multiplicity of prosecutions growing out of the same transaction, at a number of consecutive periods of time in one night.

In *Clerc vs. Boudreaux*, Mayor, 38 An. 732, this court held that a justice of the peace has no jurisdiction *ratione materiae* to entertain a suit in which damages are demanded, and defendants are enjoined "from claiming and collecting daily charges for the use of a market stall," etc.

From all of the foregoing adjudications we can easily gather the principles which must control our decision of this case, and they are, that one single cause of action can not be split up and divided into a multiplicity of suits for the purpose of defeating the jurisdiction of the court to which the action jurisdictionally belongs; and, that, if it be thus divided and the multiplicity of suits be consecutively filed in a court not constitutionally endowed with jurisdiction of the whole sum, or entire cause of action, same will be treated as one single suit and our writ of prohibition will go to the judge of the court entertaining the suits and arrest their further progress.

That is the situation which is confronting us now. The respondents, Golson Brothers, feeling themselves aggrieved at relator's declination of their demand to lease a market stall, filed seventeen suits for unappealable amounts, representing a single claim for damages *ex delicto*, in the court of the respondent justice of the peace, not possessing jurisdiction of the single cause of action.

To our thinking, it is clear, that the respondent, justice of the peace, exceeded the bounds of his jurisdiction in entertaining said seventeen suits, and our writ of prohibition should be made peremp-

 Telegraph Co. vs. Railroad Co.

tory as to all respondents, forbidding them, or either of them, to take any further proceeding therein.

It is therefore ordered and decreed that the provisional writ of prohibition be made peremptory and that all cost, be taxed against the respondents *in solido*.

 No. 12,342.

 POSTAL TELEGRAPH CABLE COMPANY OF LOUISIANA VS. MORGAN'S
LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY.

Act. No. 124 of 1880 gives the right to construct a telegraph line over a railroad's right of way.

The acts of Congress of 1866 and 1872 are on the same subject and give the right to construct a line of telegraph, under certain conditions, along and over the right of way of railroads. The State law is subordinate to these acts, but may be resorted to for condemnation and compensation.

Doctrine as to damages awarded by the jury in condemnation cases in case of Telegraphic Cable Company vs. Railway Company (43 An. 522) affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Farrar, Jonas & Kruttschnitt and *J. H. McLeary* for Plaintiff, Appellant.

Denégre, Blair & Denégre for Appellant.

Argued and submitted December 17, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. The plaintiff corporation, organized under the laws of Louisiana, instituted this suit to obtain the condemnation of the property of the defendant corporation, necessary for the operation of its line of telegraph over the right of way of the defendant corporation.

There was an exception of no cause of action filed.

The ground of the exception is that Act 124 of 1880 does not authorize the construction of a telegraph line over the right of way

49	58
49	1279
49	1282

49	58
51	1614
49	58
108	8

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of the defendant corporation; that said act only authorizes the construction parallel to and beyond the right of way, as the right of way is essential to the proper and successful operation of the railroad, and that the construction of telegraph lines would, by multiplication of wires, interfere with the running of trains, and the possible falling of poles would endanger the safety of trains. The act authorizes the construction of telegraph lines along and parallel to any of the railroads in this State. It does not state how far they shall be from the railroad, but there is a *proviso* that there shall be, by the construction of the lines of telegraph, no obstruction in the way of the operation of the railroad. If the location of the line is too near the road, the pleadings in this case do not warrant us in passing upon this fact. The question presented, first, is there authority in said act for the use of a part of the right of way to construct said plaintiff's line; and second, the amount of compensation to be awarded the defendant.

So far as the location of the telegraph line over defendant's right of way is at issue, the act of Congress of July, 14, 1866, provides "that any telegraph company now organized, or which may be hereafter organized under the laws of any State of the Union, shall have the right to construct, maintain and operate lines of telegraph over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, provided said lines shall not be so constructed as to interfere with travel on such roads, and provided also: "that before any telegraph company shall exercise any of the powers or privileges conferred by this act such company shall file its written appearance with the Postmaster General of the restrictions and obligations required by this act." Congress in 1872 declared all the railroads in the country which are now or may hereafter be in operation, post roads. The plaintiff corporation has filed its appearance and acceptance of the provisions of the act of 1866. The defendant contends that as the plaintiff is proceeding under act of 1880, he must be confined to its provisions. But the act of Congress is paramount, so far as location or the right of way is concerned, and the act of 1880 is auxiliary to it, and provides for the method of condemnation and compensation. The act of Congress of 1866 authorizes no compulsory process. *Pensacola Telegraph Co. vs. Western Union Telegraph Company*, 96 U. S. 1. Hence the necessity of resorting to State process for condemnation and compensation.

State vs. Green.

On the merits we find some difficulty in arriving at a satisfactory conclusion as to the amount which should be awarded the defendant for the use of the right of way. The inconvenience which the defendant may experience is controverted. It is asserted by plaintiff's witnesses that the establishment of the telegraph line will cause no inconvenience to defendant, but, on the contrary, will be an advantage. This, defendant's witnesses deny, and we believe with them that inconveniences may occur, and additional burdens may be imposed upon defendant. But we have no means of ascertaining the amount of damage in money that would be inflicted upon defendant. This inconvenience is an element, however, to go into the general estimate. The lands may, along defendant's right of way, be of peculiar or particular value for specific purposes, but we do not understand that they are now devoted to these purposes. The plaintiff must, however, make compensation proportionately for the cost and expense of defendant in putting in condition the right of way. It can not avail itself of improved conditions without compensation. The construction of plaintiff's line will occupy a right of way of defendant of some ten feet, with its cross pieces on poles.

We do not care to disturb the verdict of juries in case like the instant one without manifest injustice is done in either underestimating or the giving of excessive awards.

Telegraph Cable Co. vs. Railway Co., 43 An. 522.

We are of the opinion that the jury returned a verdict substantially correct.

Judgment affirmed.

No. 12,826.

THE STATE OF LOUISIANA VS. JAMES GREEN.

To quash a *venue* on the ground of irregularity in the proceedings of the jury commissioners, in drawing a jury panel, the defendant must make his point clear and certain. It will not do to make it probable merely.

The refusal of a trial judge to grant a new trial on the ground of newly discovered testimony will be sustained when it appears that it was only cumulative.

A PPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guton, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

State vs. Green.

E. N. Pugh, for Defendant, Appellant.

Submitted on briefs December 5, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

WATKINS, J. The defendant is charged with murder, was convicted of manslaughter and sentenced to imprisonment at hard labor in the penitentiary for a term of six months; and from the verdict and sentence he prosecutes this appeal, relying upon one bill of exceptions, in which his counsel assigns as error of the trial judge, his refusal to quash the general *venire* on account of alleged irregularities in the manner of drawing the same, and other bills to be found in the transcript.

The motion to quash and set aside the *venire* of jurors is to the effect "that said *venire* was not drawn in accordance with law, and that a trial by (jurors drawn from) said *venire* will be a fraud, and cause your mover herein great and irreparable injury;" and it charges, that the "drawing of said *venire* was illegal and contrary to law on its face (in) that only four members of the (jury) commission were present, and there is nothing to show that the members of said commission were notified in accordance with Sec. 3 of Act 99 of 1896. That, on its face, the three hundred names required by Sec. 4 of said act were not drawn as required and laid down in said section of the act, which was violated in every respect."

On the trial of this motion, counsel for the defendant introduced and filed in evidence the *proces verbal* of the drawing of the *venire* and the record of the proceedings of the jury commission, and rested. The District Attorney offered no evidence. The trial judge, in overruling the motion, assigned no reasons, and none are appended to the bill of exceptions reserved to his ruling by defendant's counsel.

We have extracted from the brief of defendant's counsel and reproduce the *proces verbal* of the jury commission, so as to show clearly the contention upon which defendant's counsel places reliance.

State vs. Green.

It is as follows, to-wit:

"We transcribe in full the entire record connected with the drawing of this jury.

"General Venire List.

"August 19, 1896.

(Here follow three hundred names.)

"STATE OF LOUISIANA, }
"Parish of Ascension. }

"Be it remembered that on this 19th day of August, 1896, we the undersigned jury commissioners of the parish of Ascension, duly appointed by the judge of the Twentieth Judicial District Court, evidence of which appointment being duly entered upon the minutes of said court and duly sworn evidence of which being filed and of record, did meet at the office of the clerk of said court; and Christian Kline, one of the commissioners, in the presence of the other commissioners and two disinterested witnesses, proceeded to draw from the 'general venire box,' one at a time, the number of names of persons required for service at the ensuing term of the Twentieth Judicial District Court for this parish, to be holden on Monday, October 12, 1896. And therefrom fifty names were drawn to compose the grand and petit jurors for the first week of said term of court, to-wit: (Fifty names.)

"And it being the judgment of the jury commissioners that a jury may be required for the second week of said court at said term, thirty additional names, to serve as petit jurors for the second week of said court, were in the same manner and at the same time drawn from said 'general venire box,' and were as follows, to-wit: (Thirty names.)

"And it being the judgment of the jury commissioners that a jury may be required for the third week of said court at said term, thirty additional names, to serve as petit jurors for the third week of said court, were in the same manner and at the same time drawn from said 'general venire box,' and were as follows, to-wit: (Thirty names.)

"And the said commissioners did thereupon place the ballots which were so drawn for each week in separate envelopes, under seal, and endorsed thereon the week for which they were respectively drawn, and the whole being placed in a box provided for that purpose, said box was sealed and placed in the custody of the clerk

State vs. Green.

of the court for use at the next term of the District Court of this parish.

"In faith whereof we have signed the present *proces verbal* in the presence of one another on the day, month and year first above written.

" (Original signed)

C. KLINE
C. A. BULLION.
J. E. LANDRY.
JOHN F. LANDRY.
FRED. LANDRY,
Clerk.

" Witnesses :

J. F. FERNANDEZ.
J. T. BLOUIN.

" A true copy :

(Seal)

FRED. LANDRY,
Clerk of Court."

In order to obtain an accurate idea of the points of objection taken by defendants's council, the statute under which the jury was drawn must be examined and analyzed.

The *third* section provides, that the District Judge of a country district shall select and appoint five discreet citizens, who, with the clerk of the court, who shall be *ex officio* a member thereof, shall constitute a jury commission for each parish within his district.

It further provides that the evidence of such appointments shall be the written order of the judge, which shall be entered upon the minutes of the court.

It further provides that "three members of said commission, together with the clerk of the District Court, shall be a sufficient number to perform the duties imposed by this act, *provided* all the members shall have been duly notified by the clerk of the District Court of the time and place designated by him for the meeting of said commission, which notification shall appear from the certificate of the clerk in case of the absence of any member thereof."

The *fourth* section provides that said commission shall, within thirty days after their appointment, select, according to the provisions thereof, the names of three hundred persons, a list of whom shall be made by the clerk under the supervision of the commission and supplemented thereafter from time to time as therein directed.

That each of their names shall be written by the clerk on a separate slip of paper, which shall be deposited in a box denominated the general venire box. That within not less than thirty days prior to the meeting of a jury term of court the jury commission shall meet and rectify and revise the aforesaid list and the general venire box. That it shall be the duty of the clerk of court to make a *proces verbal* of the acts of the commission and record same in a book to be provided and kept for that purpose, and that it shall be signed by the clerk, the members of the commission and the witnesses.

The *fifth* section provides that within thirty days of the meeting of a jury term of court the commission shall meet and "draw from the general venire box," one at a time, the number of persons required for service at the ensuing term of court, and the first fifty names so drawn shall compose the grand and petit jurors for the first week of the court."

That the "clerk shall keep a record of the drawing with a list of all names in the order they are drawn and showing the weeks for which they have to serve; and, when the drawing and the *proces verbal* is complete, shall deliver a copy of same to the sheriff," etc. (Act. 99 of 1896).

1. Comparing the *proces verbal* which is in evidence with the law it will be seen that there was not only a majority of three of the jury commissioners out of the five appointed, present and participating in the drawing of the jury, but there were four of them present in addition to the clerk of the court.

Counsel's insistence is that the *proces verbal* shows that one of the commissioners was absent, but fails to show that all the members of the commission had been duly notified by the clerk of the time and place at which the commission was to assemble. Counsel has misapprehended the direction of the statute in this particular, which says this "notification shall appear from the certificate of the clerk in case of the absence of any member thereof."

Non constat that, if the proper source of information had been examined and resorted to, the proof could not have been supplied.

2. With regard to the other part of counsel's argument we deem it a sufficient answer to say that it is the fourth section of the act which directs the manner in which the jury commission shall form and prepare the general venire box and the list of three hundred names composing same, and the fifth section indicates the *modus*

operandi of drawing a jury from the general *venire* box for service at a term of court.

The proceedings of the commission are entirely distinct. Consequently it will not do to argue that no general *venire* box had been formed at all, because the *proces verbal* of the acts of the jury commissioners in drawing a jury did not go into the details of its formation. But the *proces verbal* does state that the commission "proceeded to draw from the general *venire* box" certain names, and the list of the names of the three hundred persons composing the general *venire* box is annexed to and forms a part of the *proces verbal* itself.

Had that question been explored by proof we feel satisfied that this presumption of the existence of a general *venire* box would have been confirmed. We are of opinion that the motion to quash was properly overruled. *State vs. Saintes*, 46 An. 547.

With reference to the refusal of the judge to grant a new trial on the ground of newly discovered witnesses we think he conformed to precedents firmly established, as the testimony proffered was cumulative merely. *State vs. Jones*, 46 An. 545. We find no reviewable error on the record.

Judgment affirmed.

No. 12,190.

LAWRENCE G. CRONAN VS. CRESCENT CITY RAILROAD COMPANY.

49	65
1123	572

It is the duty of the carrier to convey the passenger safely to his destination, any want of care on the part of the street car conductor resulting in injury to the passenger will make his principal responsible, but to call a boy passenger to the platform of the car about to reach his destination, the signal to stop the car given and the boy called at the right time, will not be deemed negligence of the conductor charging the carrier with responsibility for injuries to the boy by falling from the platform or car steps, the fall being due to his own imprudence. *Hutchison on Carriers*, Sec. 553 *et seq.*, 665, 666 *et seq.*; 102 U. S. 451.

The court distinguishes this case from that of negligence implied from allowing boys of tender age to ride on platforms of street cars. 72 Wis., p. 72; 27 Mich. 510; 75 Pa. 86.

The carrier of passengers will not be held responsible for injury to a boy passenger caused by his own imprudence, merely because of his age, nearly ten years. *Hutchison*, Sec. 686 *et seq.*, and authorities there cited.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Crouan vs. Railroad Co.

Benjamin Rice Forman and B. R. Forman, Jr., for Plaintiff, Appellant.

Farrar, Jonas & Kruttschnitt for Defendant, Appellee.

Argued and submitted November 5, 1896.

Opinion handed down November 16, 1896.

Rehearing refused January 18, 1897.

The opinion of the court was delivered by

MILLER, J. The appeal is from the judgment of the lower court, rejecting plaintiff's demand for injuries to his minor son, arising, the petition alleges, from the careless striking or pushing the son by the conductor of defendant's street railway car, the son being a passenger, and by that striking or pushing, plaintiff's son fell from the car with great force on the stone pavement, sustaining the bruises and other injuries for which the suit seeks damages.

The answer is the general issue, and imputes the injuries of the son to his fault and negligence in jumping from the car while in motion.

The allegation in the petition is of negligence on the part of the conductor that would, if sustained by testimony, fix liability on the defendant. It is the carrier's duty to carry his passenger safely to his destination, and any carelessness of the conductor in striking, pushing the passenger, or other form of imprudence, whereby he falls from the car and is injured, will make the carrier responsible. Story on Bailments, Sec. 593 *et seq.*; Hutchison on Carriers, Sec. 553 *et seq.*; Pennsylvania Company vs. Rey, 102 U. S. 451; New Jersey Steamboat Company vs. Brockett, 121 U. S. 637.

We have, therefore, given careful attention to this branch of the case. It seems that when the car neared the corner at which the boy was to alight he came to the platform on the signal of the conductor, passed, or, as he says, "dodged," under his arm, raised to pull the bell-rope for giving the requisite notice for stopping to the motorman. The boy testifies he was struck on the shoulder by the arm of the conductor in its descent from pulling the bell-rope. A fellow-passenger, seated near the door of the car on the side oppo-

site to that on which the boy was to alight, testifies most distinctly the boy had reached the step, fell from it when the conductor's arm was still raised, and was not struck by it. The testimony of the fellow-passenger is not marked by the expressions often occurring in negative testimony. He states he had the boy in full view, saw him fall, and saw the conductor's arm raised at the time, and it did not strike the boy. In aid of this testimony it is urged on us that in pulling the bell-rope the conductor used his hand in a direction lateral to the rope; does not move his arms downward, and even if downward that the slack of the bell-rope is not sufficient, considering the height of the rope from the platform, to permit the elbow of the conductor's arm to come in contact with the shoulders of a boy shown to be four feet five inches high. Whatever the force of this argument, it is aided, if, according to the testimony of the fellow-passenger, the boy was on the step. But, irrespective of the argument based on the position and height of the boy, the distance of the bell-rope from the platform or the step, in the condition of the testimony, to sustain the charge of negligence in striking or pushing the boy, we would have to disregard the very positive testimony of the fellow-passenger, and the equally distinct testimony of the conductor, that the boy was neither pushed nor struck. The boy is, doubtless, truthful of his impression. His statement "he dodged under the conductor's arm, he went to pull the bell-rope, and hit him (the witness) in the back, and that is all he knew until he was brought home lying in bed," etc., puts the boy with his back to the conductor, and we are inclined to think the supposed stroke on the boy's back was an inference, but however regarded, confronted as the testimony of the boy is, with that of the fellow-passenger and the conductor, we are unable to accept the theory of the petition as that of the accident. On this issue of fact, too, the judgment appealed from was against plaintiff, and the record shows, in our opinion, no basis to disturb the conclusion of the lower court on this branch of the case.

The plaintiff conceives that the testimony furnishes a basis of liability of the defendant, although not alleged in the petition; i. e., that the boy was exposed to danger on the platform. The defendant earnestly contends that plaintiff should be restricted to the cause of the injury stated in the petition. We have, however, considered the testimony on which the plaintiff relies. The plaintiff brings to our

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notice the rules of the defendant company for the guidance of its conductors and motormen, one of which rules is, that children unattended by their parents will not be permitted to stand on either platform of the car. The plaintiff claims the rule was not observed in this case; that its non-observance caused or contributed to the accident; that there was negligence of the conductor chargeable to the defendant. The law with reason exacts of the carrier greater care of the passenger, a child of tender age, than of an adult. *Hutchison on Carriers*, Secs. 665, 666 *et seq.* The rule simply affirms the prudence enjoined by the law. The child, in the language of the text writer, should not be permitted to occupy positions of danger, nor otherwise expose themselves to injury, at least without warning. The cases illustrating this are cited by the text writer and by plaintiff. In 75 Penn. State, the boy thirteen years old was permitted to ride on the platform of the car, with no admonition or objection from the conductor, and announcing his purpose loud enough for the conductor to hear, the boy stepped off the car while in motion, was dragged by it and was injured. The case cited from 14 S. W. we have not examined, and presume it is of the type indicated in the text-book. In 27 Michigan, p. 510, the child was permitted to ride on the platform, fell off and was injured. In 72 Wisconsin, p. 42, the car passed the station, the destination of a boy passenger, it being intended the train should return to that station, but the boy, ignorant of this intention, jumped from the moving train and was injured. *Hutchison on Carriers*, Secs. 665, 666 *et seq.* In the first of these cases the appellate court set aside the verdict directed by the lower court, and held the question of negligence should have been submitted to the jury. In the cases from 27 Michigan and 72 Wisconsin, the defendant carriers were held liable, in the one case, because the conductor permitted the children to ride on the platform—a position of danger; and in the other, because the child was not told the car was to return after passing the station. In this case, the boy's account is, when he got between South and Lafayette street, the conductor signaled him to come to the platform, saying "the next corner is yours;" the boy states he dodged under the conductor's arm, that when he went to pull the bell he hit him (the boy) on the back and he adds, that is all he knew until he found himself at home in bed. We gather from the other witnesses that when the car got to

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South street, the boy's destination, the motorman motioned the boy to the platform, that he left his seat, came out, and as the conductor put his hand on the bell to pull it, and before he had time to pull, the boy had fallen off the car. The testimony to this effect comes from a fellow-passenger, and to some extent, at least, is supported by that of other passengers and the conductor. It seems to us the case is distinguished from that in which the boy passenger is permitted to ride on the platform. To use the platform in lieu of the seats inside during the course of the transportation, is not the same as calling the boy to the platform when the car is about stopping at his destination. The boy was in his seat when called until called to alight. We do not understand it to be questioned that the stop signal was made and the boy called at the right time, and he had to come to the platform to alight. His fall after he got there, not caused by the push of the conductor, as charged in the petition, must, in our view, have resulted from his missing his footing on alighting from the car before it came to a full stop. The evidence submitted compels the conclusion the fall was due to his imprudence.

It is urged on us, however, that negligence is not imputable to children of tender age. It is, however, equally true that carelessness in children who are of age sufficient to exercise discretion for the avoidance of injury to themselves when traveling in street cars, is recognized. *Hutchison on Carriers*, Sec. 666 *et seq.* The law does not fix this age of discretion. All that we have before us on this branch of the case is, that the parents of the boy deemed him old enough to travel by himself, and the fact he was nearly ten years of age. If, as we hold, he was not exposed to peril and could have left the car with safety using ordinary care, we do not think the defendant can be held liable merely and only because of the boy's age. Neither reason or the authorities exact that the carrier of passengers shall anticipate and guard against injuries which ordinary prudence would avoid, and that prudence, it seems to us, is not dispensed with on the part of a boy placed on the car by his parents and of that intelligence usual to the age of ten. We can not, therefore, on this ground, that his age, in effect, made his imprudence the neglect of the conductor, hold defendants liable.

We have given attention to the case in all its aspects and to the authorities cited by plaintiff, and our conclusion is the defendants can not be adjudged responsible for the accident.

State vs. Young.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,315.

THE STATE OF LOUISIANA VS. JAKE YOUNG.

Act 59 of 1896 does not repeal Sec. 792 of the Revised Statutes.

The question is one of intention of the Legislature.

By making it possible to inflict a greater punishment of a similar character to the punishment under the old law, the Legislature has not made manifest an intention to repeal the old law.

A PPEAL from the Twentieth Judicial District Court for the Parish of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondron*, District Attorney, for Plaintiff, Appellant.

John Marks (E. N. Pugh, of Counsel), for Defendant, Appellee.

Submitted on briefs November 21, 1896.

Opinion handed down November 30, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

BREAUX, J. The defendant, Jake Young, was indicted by the grand jury for the parish of Assumption in September, 1896, for assault with intent to commit rape.

He interposed a demurrer and a motion to quash the indictment on the ground that by Act No. 59 of 1896, the Art. 792 of the Revised Statutes has been repealed.

The demurrer and the motion to quash were sustained by the District Court.

The District Attorney prosecutes this appeal from the ruling.

The act in question contains no reference to the section in question of the Revised Statutes.

It defines the offence as it is defined in the section.

49	70
49	1358

49	70
50	682
49	70
109	239

State vs. Young.

Additional punishment may be imposed under the new law, but it does not provide a new and different punishment.

Our conclusion on this point would be different if the punishment under the new law were entirely different from what it is under the old law, for, in the same case, the two laws would be absolutely irreconcilable and the latter would repeal the former by implication.

Mr. Sutherland on Statutory Construction says: "Where, however, the new statute contains no reference for repeal or otherwise to existing statutes, and defines an offence made punishable by a prior law, and imposes a new punishment, it will not repeal such prior laws as to existing cases; for as the new law will operate prospectively, there is as to offences already committed no conflict. The prior law will operate as to all offences committed up to the time that the new law goes into effect, and the trial may be had and judgment pronounced afterward." Par. 143.

"The question ever is: Did the Legislature intend to repeal the former law, or was the new law intended to be merely cumulative?" Sutherland —.

By making it possible to inflict greater punishment of a similar character, under the last law, the Legislature has not made manifest an intention to repeal the old law and to issue a "legislative pardon" to those under indictment at the time.

A repeal will not be implied unless the last statute contained provisions contrary to or irreconcilable with those of the original law.

Again, if the statute on the same subject can be reconciled without destroying the obvious intent of the law-making authority, there will be no repeal.

The latter act adds a number of years to the term of service. A sentence can not be imposed under the original law in excess of the penalty provided in the prior statute. A sentence within the penalty of the original act may be imposed without in the least conflicting with the last statute. A punishment of two years or less is the same punishment under the first law for a past offence.

The repealing clause of the last act repeals prior inconsistent laws, but not all laws on the same subject matter. We must endeavor to construe these acts as to, if possible, reconcile the two acts.

Having this in view, we do not think we should hold that the prior law is repealed, unless it is manifestly inconsistent, and it is impossible to reconcile the two.

Lumber Co. vs. Manufacturing Co.

The implication of repeal must be a necessary one. *Ludlow Heirs vs. Johnston*, 3 Ohio, 553.

From the last cited case we quote: "No court will, if it can be consistently avoided, determine that a statute is repealed by implication."

The two statutes here are affirmative statutes. The latter denounces offences committed since it was promulgated; the former is in force as to offences committed prior to the latter act.

In other words, in the nature of things the last law becomes effective from and after its passage.

A similar question was decided by the Supreme Court of Alabama in *Turner vs. The State*, and in *Miles vs. The State*, both reported in the 40th Alabama.

In the last cited case the court cites *Commonwealth vs. Pegram*, 1 Leigh, 569; *Allen vs. Commonwealth*, 2 Leigh, 727; *Pitman vs. Commonwealth*, and *Wright vs. Laine*, 2 Rob. Va. Rep. 600, as sustaining the conclusion of the court, that no repeal was effected.

As in the last Alabama case, in the case before us, the use of the equivalent words to those in the Alabama law ("all laws or parts of laws in conflict herewith" are repealed, instead of all laws in the same subject matter), perform the office of a saving clause.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, reversed and avoided; further, that the case be reinstated on the docket of the court and the trial proceeded with under the indictment as required by law.

No. 12,210.

POITEVENT & FAVRE LUMBER COMPANY VS. STANDARD PLANING
MILLS AND MANUFACTURING COMPANY, LIMITED.

It appearing from the evidence that the president of a going corporation disposed of a portion of his surplus stock of mules to a creditor, with the consent and approval of its board of directors, under the impression that the company was solvent, and with the object of tiding over a temporary financial embarrassment and without interrupting the operations of its plant, it is not liable to an attachment on the ground that the evident intent of the president and board of directors was to fraudulently dispose of the property of the corporation, or to give to some of its creditors an unfair preference.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

49	72
49	944
49	72
522	1400

Lumber Co. vs. Manufacturing Co.

Farrar, Jonas & Kruttschnitt for Plaintiff, Appellant.

Joseph Brewer and *Ernest T. Florance* for Defendant, Appellee.

Argued and submitted November 16, 1896.

Opinion handed down November 30, 1896.

Rehearing refused January 18, 1897.

The opinion of the court was delivered by

WATKINS, J. This is an ordinary action upon a matter of indebtedness of the corporation, coupled with a writ of attachment.

Defendant's counsel took a rule upon the plaintiff for the dissolution of the writ on several grounds; and upon the trial thereof same was dissolved, and the seizure discharged. Thereupon the case went to judgment on the debt—there being practically no dispute as to that—and therefrom the plaintiff has appealed, seeking the reinstatement of its writ and the restoration of its seizure.

Dealing with the judgment dissolving the writ of attachment, it will be only necessary for us to discuss one of the grounds enumerated, and that is the alleged untruthfulness of the affidavit to obtain the writ, in point of fact, as in our opinion that is fatal.

The affidavit is grounded upon Code of Practice, Art. 240, paragraph 4, and affirms that the defendant had parted with or disposed of, or was about to part with or dispose of his property or some part thereof "with intent to defraud his creditors, or give an unfair preference to some of them."

We make the subjoined extracts from the brief of plaintiff's counsel as most completely expressing its views of the legal situation as it is presented upon the testimony taken at the trial, viz.:

"We do not claim that Mr. Gause, the president of this corporation, was guilty of a corrupt intent to perpetrate a dishonest and immoral act, but we do say that he was guilty of acts which the law denounces as a fraud in law, or as giving a right to a creditor to a writ of attachment, and that he is conclusively presumed to have intended the consequences of his acts.

We say further, that it is not necessary that a debtor should have been guilty of fraud in a moral sense, or even in the legal sense, in

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order to entitle a creditor to a writ of attachment. It suffices that proof should be made of an intent to give an unfair preference to a creditor, and that intent unquestionably existed in this cause.

"We say that the president of the company intended to make a *dation en paiement* to a stockholder at a time when the corporation was insolvent, and we say that that *dation en paiement* was necessarily a fraud at law, and therefore when he executed the *dation en paiement* he intended the fraudulent preference. Not only does the Code declare such a *dation en paiement* to be an absolute nullity (C. O. 2658), but the courts have over and over held that such a *dation* is a legal fraud and may be set aside. See *Lovell vs. Payne*, 30 An. 511, and an overwhelming mass of authorities cited in *Hennen, verbo Obligations*, 7, p. 1036, *et seq.*," p. 14.

Again:

"The counsel for the receivers seems to attach great weight to the fact that there was no concealment of his acts by Mr. Gause; that he admitted all the facts of the case when complaint was made to him by Joseph A. Favre, the treasurer of the plaintiff corporation, and that he made certain offers to Mr. Favre similar to the offers which he had made to Jay and to others, and which offers had been accepted by Jay and others.

"We do not think that this frankness of Mr. Gause affects the legal rights of the parties at all. Even admitting the most that was claimed by counsel, or by any of the witnesses in the lower court, all that is shown by the evidence is that an offer was made to the plaintiffs to give them an illegal preference similar to the one given to other creditors of the defendant. Had the offer been accepted, the plaintiffs would have obtained an utterly worthless preference, and that they chose to refuse it and to take out an attachment does not weaken their position in the least.

"Counsel for the liquidators takes great pains to show that Mr. Gause was honest in all that he did.

"Allow us here to repeat that we are not accusing him of any moral turpitude, and that it may be conceded that he did not intend to do anything morally wrong. He did, however, unquestionably give preferences which he thought that he had the right to give, but which are clearly illegal under the laws of the State of Louisiana, which were clearly void, and which clearly entitled other creditors to writs of attachment.

"All the evidence upon the subject of the interview between Mr. Favre and Mr. Gause is given by Mr. Gause himself, Mr. Favre and two other creditors who were present at the time, to-wit: Mr. Billington and Mr. Brownell." Page 17.

Evidently the plaintiff's counsel rests its case almost exclusively upon the *proven* insolvency of the defendant corporation, and its having given property thereafter in satisfaction of the claims of certain of its creditors; and adequate corroboration of this is found in this sentence, viz.:

"We say further, that it is not necessary that a debtor should have been guilty of fraud in a moral sense, or even in a legal sense, in order to entitle a creditor to a writ of attachment. It suffices that proof should be made of an intent to give an unfair preference to a creditor, and that intent unquestionably existed in this cause.

"We say that the president of the company intended to make a *dation en paiement* to a stockholder at a time when the corporation was insolvent, and we say that that *dation en paiement* was necessarily a fraud in law," etc.

But was the corporation insolvent as a matter of fact? What is the proof on this question?

As a witness the president of the defendant corporation makes answers to questions propounded as follows, viz.:

"Q. What was the amounts of the debts of the defendant say on the 1st of June, 1895?

"A. With notes we had given, other people's notes, it was about fifteen thousand or sixteen thousand dollars.

"Q. That included all the mortgage notes on the real estate?

"A. No.

"Q. How much did they amount to?

"A. The mortgaged notes amounted to ten thousand eight hundred and fifty dollars.

"Q. Then the total amount of the debts of the company approximated twenty-seven thousand dollars?

"A. Yes.

"Q. Was a statement of this debt presented at the meeting of the creditors on the 28th of May?

* * * * *

"A. I think so.

"Q. Approximately?

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" A. Yes; including other people's notes that had not been paid.

" Q. But those were liabilities of the concern?

" A. Yes."

The foregoing statements were elicited upon the cross-examination of the witness, and the following occurred in the course of his re-examination, viz.:

" Q. You stated that the indebtedness of the company at the time was in the neighborhood of twenty-seven thousand dollars; now state what their assets consisted of?

" A. Our real estate cost nearly fourteen thousand dollars, and we paid nearly three thousand five hundred dollars out of it. It is appraised at thirteen thousand dollars now. Our lumber was then considered worth six thousand dollars. Our machinery and sheds and teams cost twenty-two thousand dollars; and our bills collectible amounted to four thousand dollars or five thousand dollars.

" Q. Out of this total of forty-six thousand dollars, what would you consider a fair estimate of the actual value of the assets of the concern?

" A. Well, I consider the real estate worth fourteen thousand dollars; the machinery and sheds cost twenty-two thousand dollars, and as a running outfit it ought to be worth fifteen thousand dollars; the lumber ought to bring five thousand dollars; and the bills, perhaps, three thousand dollars or four thousand dollars.

" Q. Then you estimate the value of (the assets) of this corporation at the time of taking out of the writ of attachment, in the neighborhood of thirty-nine thousand dollars?

" A. Yes; as a running plant," etc.

This statement is not contradicted by any other witness, and is practically undenied.

In the course of the argument it was said that in the director's answer to the petition of creditors of the corporation in the District Court praying for the appointment of a receiver, there is an admission of the insolvency of the defendants, and that those proceedings were commenced only a few days subsequent to plaintiff's attachment; and plaintiff's counsel urge this judicial admission as conclusive proof of the insolvency of the defendant at date its attachment issued.

But this answer having been filed by the directors subsequent to the attachment it can not have any retroactive effect in reference to

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the fraudulent intent of the defendant at the date of and antecedent to the making of the affidavit. An attachment is a harsh remedy, and must be strictly construed. It must depend upon the state of facts existing when it was applied for.

On the question of fraudulent intent, the president was interrogated fully as to the details of all the transactions upon which the plaintiff founded its attachment, and thereupon the following occurred, viz.:

"Q. What was your intention in transferring these materials to creditors? I am asking you now in regard to the allegation of the petition that the transfers (of property) were made with the intent to defraud the creditors, or give an unfair preference to some of them. Now what was your intention in making those transfers?

"A. I offered some lumber to Mr. Favre. In the first place, in regard to the teams: one-half of our teams were on pasture for six months or more, and we did not have any use for them. I consulted the directors, and we came to the conclusion that we *could run our business* with one-half the teams. They were an expense to us, and *with one-half we would still have enough to carry on business*. So I advised with them, and they consented and agreed to transfer some of them at a good round figure. We sold those teams at a figure which would to-day be twice as much as they would sell for at auction, or sheriff's sale.

"Now, in regard to the lumber that I sold; my idea in selling that was to get a better price, with the exception of the lumber I sold to Mr. Billington. And I was satisfied that if we could have sold our lumber and collected our debts, that it would have gone far toward paying the indebtedness of the corporation without touching the plant. And I wanted to cancel as many debts as possible in that way; by selling lumber at a better price.

"I had no idea that any one would object to my making any such sales. But as soon as any one objected, I (did) not sell another dollar's worth of goods to any creditor. As soon as objection was made I stopped immediately."

Counsel for plaintiff insists in applying to this case the precepts of our jurisprudence applicable to the intent to defraud in matters of insolvency; but should we do so, the facts adduced and quoted in part herein would not, in our opinion, justify us in reversing the judgment of the District Court.

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In *Burdeau vs. His Creditors*, 44 An. 11, we find quite a similar case stated.

In that case certain of his creditors opposed the discharge of the insolvency on specifications of fraud, to the effect that he had given an undue preference to some of his creditors by giving them mules in partial payment of their claims notwithstanding his insolvency at the time.

The opinion says:

"Whether the insolvent be *guilty of fraud* or not under this section, is, in the first place, dependent on a question of fact as to the insolvent's commission of the reprobated act; and in the second place, on the fact of his having successfully rebutted the legal *presumption of guilty intent* raised on the proof of the act."

Having examined the facts and applied them to the provisions of the insolvent law, the opinion proceeds thus:

"These precepts of the insolvent law have often been examined and interpreted, and in so doing our predecessors have said that they are highly penal in character, and in their consequences on conviction of fraud, and must be strictly pursued. The acts charged must not only be such as the law declares fraudulent, but *done with fraudulent intent*."

Citing *Campbell vs. His Creditors*, 16 La. 348.

Our predecessors have frequently employed, in this connection, such emphatic language as this, viz.:

"To constitute fraud there must be an intention of defrauding, *consilium fraudis*, and an actual loss, *eventus damni*."

Montilly vs. Creditors, 18 La. 388; *Slocomb vs. Bank*, 2 R. 92.

Upon this statement of the law as applied to the facts stated, the judgment of the lower court in favor of the insolvent rejecting the demands of the opponents, was affirmed.

From the evidence in this case it conclusively appears that the defendant corporation was, at the time of the transactions which are complained of, a going concern in full operation, and that the evident object sought to be attained thereby was to tide over a temporary embarrassment, by disposing upon favorable terms of a portion of the company's surplus stock without, in any way, interfering with the operations of the plant.

We can not regard them in the light of fraudulent transactions or as having conferred unfair preferences, with an intention of injuring

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other creditors of the corporation, even in the light of the insolvent laws.

But, viewing them in the light of jurisprudence upon the subject of attachment, we think the judgment must be affirmed, for by a long line of adjudications, commencing with those rendered by the court immediately subsequent to the amendment of the Code of Practice in 1868, it has been uniformly and consistently held, that the *intent to defraud* is the essential ingredient, without proof of which an attachment under its provisions could not be sustained.

The language of the enactment is "with intent to defraud his creditors, or give an unfair preference to some of them." C. P. 240, No. 4.

In *Hoy vs. Weiss*, 24 An. 269, it was held that "the evidence must show affirmatively that the defendant is about encumbering or disposing of his property with the intent of defrauding his creditors."

To the same effect is *Moulor vs. Rosengarden*, 22 An. 531.

In *Abney vs. Whitted*, 28 An. 818, it was said that "the intent is the essential ingredient, and we think neither the petition nor the evidence shows such intent in the defendant. The simple fact of giving a mortgage to secure a creditor's claim does not of itself give a ground for the writ."

In *Hermann vs. Amedee*, 30 An. 395, it was held that the fraudulent intent necessary to support an attachment is not shown by the mere fact that a merchant is selling property and paying off debts, including that of the plaintiff.

Very much the same opinion is expressed by the court in *Hernsheim vs. Levy*, 32 An. 340.

Later adjudications by the court as at present constituted are of exactly similar purport.

In *Ferguson vs. Chastant*, 35 An. 339, the court said:

"The intent to defraud must justify the attachment. It does not suffice that appearances indicate it."

In *Lehman vs. McFarland*, 35 An. 624, it was held that an attachment could not be sustained when the "proposed disposition of their property by the defendants was in the interest of their creditors, whom they proposed to place on a footing of equality and fairness."

In *Bank vs. Moss*, 41 An. 227, it was held that fraudulent intent existing at the time of the act complained of, controls.

In *Seeligson vs. Rigmaiden*, 37 An. 722, it was held that fraudulent intent must *exist*; appearances are not sufficient.

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In *Chaffe vs. Mackenzie*, 48 An. 1062, we said: "In order to sustain an attachment there must be proof that at the time the writ issued the defendant had done, or was about to do the acts charged. The intent also must exist to defraud or to give an unfair preference. This intent, which rests in the bosom of the defendant, can only be shown by the acts and declarations of the defendant, and the conclusions to be drawn from them."

And in the recent case of *Winter vs. Davis*, 48 An. 260, we affirmed and emphasized what had been so frequently said, and employed the following language in so doing, viz.:

"An attachment based upon Nos. 4 and 5 of Art. 240, C. P., must be supported by proof of an act or acts showing the fraudulent intent of the defendant to place his property beyond the reach of his creditors, or to give an unfair preference to some of them."

Again:

"It is not evident that the intention of the defendant was to place his property beyond the reach of his creditors, or to dispose of it so as to give an unfair preference. These are the essentials to sustain an attachment." *Vide also*, *Claffin & Co. vs. Davis*, 48 An. 1223. See also *John P. Baldwin, Receiver, vs. McDonald*, 49 An., just decided.

The judge *a quo* entertained the opinion that the proof did not establish that defendant had disposed of its property with a fraudulent intent, and dissolved plaintiff's attachment, and in our opinion he was right in so doing.

Judgment affirmed.

 No. 12,191.

SUCCESSION OF R. L. ROBERTSON, JR.

Whether an executrix is legally or illegally appointed, having qualified and entered upon the discharge of the duties of the office she must be treated as lawfully appointed until her appointment has been judicially revoked.

Unless the appointment is absolutely null and void, acts done by an administration representative in such capacity are legal and binding. Mere illegality of appointment of an executor will not vitiate acts done under it.

Having accepted the trust of an executrix, and qualified under it, and taken charge of the estate, she is powerless of her own motion to abandon that trust and assume the quality of heir. Judicial act is necessary for her discharge.

49	80
60	557
61	606

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The law fixes the commissions of an executor at two and one-half per centum on the amount of the estimate in the inventory; but he is entitled to five per cent on amount of rents and revenues which have come into his hands in the course of administration, provided same are not amounts which are covered by the inventory.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict for Executrix, Appellee.

Buck, Walshe & Buck for Opponent, Appellant.

Argued and submitted December 4, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 18, 1897.

Opinion of the court was delivered by

WATKINS, J. This controversy arises upon an account of administration which was opposed by Mrs. Cuevas, a married daughter of the deceased by his first marriage—the opposition being chiefly directed at four items, viz.: (1) Mortgage of twenty-five hundred dollars on property on Baronne street; (2) amount of two thousand dollars, claimed to have been held in trust; (3) commissions of executrix, one thousand eight hundred and thirty-two dollars and sixty-five cents; (4) attorney's fees, twenty-five hundred dollars.

The opponent also, as a part of her opposition, alleged the absolute nullity of the will of deceased for want of form; and on that account she averred that the accountant had no standing in court as executrix.

But it is a fact and conceded in the transcript, as well as in the argument at the bar, that the nullity of the will is involved in another suit which is the subject of another appeal; it is, therefore, evident that this part of the opposition can not now be considered or decided. For the determination of that question opponent must be relegated to the other appeal.

It appears from the record and the argument as well, that the accountant, as the executrix therein named, propounded the will for

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probate, and same was duly and regularly admitted to probate, and that she was duly qualified and commissioned and took charge of the estate of the testator, and has since had its exclusive care and administration—collecting its revenues and discharging its expenses.

During that administration the property of the estate was sold—the heirs concurring in the sale, and actively promoting same.

This simple statement is sufficient to show exclusively that there was an administration actually in progress; and that the accountant was executrix *de facto*, if not *de jure*—notwithstanding, the will was subsequently attacked, and may be hereafter adjudged null and void in a different case.

It has been frequently decided that unless the appointment of a succession representative be absolutely void, his *acts* can not be successfully assailed or questioned.

In Succession of Dougart, 30 An. 268, we said:

“As to the illegality of the appointment of the executrix, it is only necessary to say, that the question can not be raised in this indirect and collateral way. Whether legally or illegally done she was appointed and qualified and must be treated as the lawful executrix until her appointment is revoked in a direct action.”

In the Succession of Altemus, 32 An. 864, it was said:

“It seems to be considered, and indeed, we do not think it can be denied, that unless the appointment of an administrator or curator is absolutely void, the acts done by them in such capacities are legal and binding, for it is now elementary that the mere illegality of the appointment will not vitiate the acts done under it. This is so true that the law will not allow a suspensive appeal from a decree appointing such official, but declares that such decree shall have immediate effect, and, therefore, regardless of the illegality of the appointment.”

In Cloutier vs. Lamee, 33 An. 305, it was said:

“Inquiries touching the legality of defendant's appointment are irrelevant. While actually exercising the office he must perform its duties, and the illegality of his appointment will not vitiate his acts.”

Citizens Bank vs. Bry, 3 An. 633; Gradnigo vs. Moore, Curator, 10 An. 670; Dorsey vs. Vaughan, 5 An. 156; Beard vs. Gresham, 5 An. 160; Succession of Lehmann, 41 An. 987; Vinet, Executor, vs. Bres, 48 An. 1254.

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Adhering to this line of authority we are of opinion that the *acts* of the qualified and acting executrix must be recognized as valid, and that the subsequent nullity of her appointment would not vitiate them.

She has a standing in court to file an account of her gestion. Having qualified as executrix and taken charge of the estate of the testator, she was powerless, of her own motion, to abandon that trust and assume the quality of heir. It was necessary for her to be relieved through the instrumentality of the law pursuant to a decree of court. Succession of Frazier, 33 An. 593.

On the trial there was judgment rejecting the demands of the opponent, homologating the account, and ordering the funds in the hands of the executrix distributed in accordance therewith; and from that judgment the opponent has appealed.

The proof shows that the principal property of the estate was the Marine Dry Dock, which was appraised in the inventory at twelve thousand dollars, and was subsequently sold for forty-one thousand dollars. It further shows that while under the administration of the executrix this dry dock yielded a little over six thousand dollars net returns within a period of about eight months. The property was exclusively community, and the executrix, as surviving widow, owned one-half in indivision with the heirs.

In the brief of opponent's counsel we find no discussion of the two items of indebtedness opposed, and, presumably, that part of the opposition has been abandoned.

In argument at the bar opponent's counsel waived all objection with regard to the *amount* of the fee claimed by the attorney for the executrix, and limited her opposition to his right to claim *any* fee. This contention is but the logical supplement of the prior contention that the accountant had no standing in court as executrix, and finding that as her appointment as executrix was not absolutely void, her *acts* are valid, and that contention must be rejected, it follows necessarily that she had the legal right to tax her attorney's fees against the estate.

The remaining question is with regard to the *amount* of the executrix' commissions—her right to claim commission resting upon the same foundation as that of her standing in court.

Her case comes within the principle announced in Succession of Hopkins, 33 An. 1166.

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The accountant claims commissions of two and one-half per centum on account of rents and revenues of succession property which she collected during her administration; the amount of cash in bank, and on account of the proceeds of property of the succession under her administration. But the contention of the opponent's counsel is that her claim should, in any event, be restricted to the amount of the inventoried value of the property. R. C. C. 1069.

The appraisement in the inventory is about twenty-three thousand dollars, while the proceeds of sales was about forty-one thousand dollars.

The Code declares that "an executor * * * shall be entitled, for his trouble and care, to a commission of two and one-half per cent. on the whole amount of the estimate in the inventory," etc. R. C. C. 1683.

The same rule applies to administrators. R. C. C. 1069.

In Succession of Linton, 31 An. 180, the court in discussing this provision of the Code in regard to an administrator's commissions of two and one-half per cent. said:

"The Code so expressly provides, and this court has thus invariably held. R. C. C. 1069, 1201; Baillio vs. Baillio, 5 N. S. 229; Succession of Milne, 1 Rob. 400; Succession of Day, 3 An. 624; Succession of Girod, 4 An. 386."

But the court allowed the administrator a commission of five per cent. on the amount of rents collected, no mention of same being in the inventory, and this in addition to the two and one-half per cent. on the amount in the inventory.

This theory appears reasonable and correct, and it is in keeping with a subsequent decision. Succession of Rhoton, 34 An. 893.

Adopting this rule, the executrix is entitled only to commissions of two and one-half per cent. on the amount of the estimate in the inventory of twenty-three thousand dollars, which is five hundred and seventy-five dollars.

And to the amount of five per cent. on the amount of the net income of the property of the estate during her administration fixed approximately at sixty-five hundred dollars, equal to three hundred and sixteen and sixty-six and two-thirds dollars.

The total amounts to eight hundred and ninety-one and sixty-six two-thirds dollars, and to this sum her commission must be reduced.

It is therefore ordered and decreed that the amount of the execu-

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trix' commissions be reduced to the sum of eight hundred and ninety-one and sixty-six and two-third dollars, and that as thus amended the judgment be affirmed.

APPLICATION FOR REHEARING.

The counsel for opponent submit their application upon the three following propositions, viz.:

"1. The court erred in holding that the executor could not by any act of his own, divest himself of his franchise and duty as executor; at least as between himself and the heirs entitled to the estate.

"2. This Honorable Court especially erred in utterly passing by as of no effect the private and personal agreement of the parties acting in their own rights and interests; whereby they jointly agreed to and did take possession of the estate of the deceased in their respective individual capacities, as owners and heirs, and thereby as to each other, at least, put an end to the administration of the executor as such.

"3. The pretended executrix is a *legatee* under the pretended will, and is therefore not entitled to any commission as executrix. R. C. C. 1686; 13 An. 103."

I.

Supposing the first one to have been so well settled as to be considered to be elementary, we cited in our opinion but one case in its support—Succession of Frazier, 33 An. 593—but as its authoritative-ness seems to be questioned, we have concluded to support it with the following references in addition.

In Succession of Townsend vs. Sykes, 38 An. 859, this court used this emphatic language, viz.:

"It is elementary in our law and jurisprudence that the duly qualified executor under a will becomes an officer of the court, for the administration of the property of the succession, and that he can perform no legal or binding act touching such property, without the sanction of the court having jurisdiction over the estate; and that an executor who has accepted the trust, and qualified as such, and who is at the same time universal legatee, can not, at will, and without the sanction and authorization of the court, shift his position, abandon his trust accepted at the hands of the court, and assume the character and exercise the rights of owner, as universal legatee.

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O. C. 3480; Bird vs. Succession of Jones, 5 An. 643; Succession of Frazier, 35 An. 382; Succession of Townsend, 37 An. 505."

The authorities certainly make the proposition clear.

II.

It is the sense of all the authorities that heirs of age and present should be joined by an executor in the judicial disposition of the property of a solvent estate, and the concurrence of the heirs and executrix in this instance amounts to that. Giddens vs. Mobley, 37 An. 417; Bird's Executors vs. Generes, 34 An. 321; Executor of Hart vs. Boni, 6 La. 97; Cronan vs. Executors, 9 An. 302; Succession of Weigel, 18 An. 49; 6 An. 494; 14 An. 610; 12 An. 684, 759; Garland's C. P. 123, and authorities cited.

III.

Whether the surviving widow of the deceased will, or will not, be recognized and adjudged as a legatee under the will, must remain an open question until the appeal, which involves the nullity of the same, has been disposed of; that question being yet undecided, we can not, in advance, say what effect same will have upon her right to demand and receive commissions. If it turns out, as counsel suppose it will, any amount of commissions she has been unduly awarded upon their supposition, can be readily deducted from the amount found due her as legacy. This right is reserved.

Rehearing refused.

No. 12,272.

WILLIAM ERSLEW AND WIFE VS. NEW ORLEANS & NORTHEASTERN
RAILROAD COMPANY, NEW ORLEANS CITY & LAKE RAILROAD
COMPANY AND NEW ORLEANS TRACTION COMPANY.

It is negligence on the part of an electric street car company in the construction and establishment of its plant to so place one of its guy wires over the track of a steam railway company as not to afford sufficient space for the latter's trains to easily and conveniently pass without risk of danger and injury to its servants and employees.

It is negligence on the part of the steam railway company to permit an electric street car company to so construct and maintain over its tracks a guy wire that will endanger the lives of its servants and employees.

If an employee of the steam railway company knew or ought reasonably to have known the precise danger to him of the guy wire of the electric street car company in the course of his employment, and saw fit, notwithstanding, to

49	86
50	195
50	728
49	86
117	592
49	86
119	578

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continue in it, he might be held to have assumed the extraordinary risk as well as the ordinary risks of his service. But this consequence must rest upon positive knowledge, or reasonable means of positive knowledge of the precise danger assumed.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Benjamin Rice Forman for Plaintiffs, Appellees.

Harry H. Hall for N. O. & N. E. R. R. Co., Defendant, Appellant.

Denègre, Blair & Denègre for N. O. Traction Co., Ltd., and N. O. C. & L. R. R. Co., Defendants, Appellants.

Argued and submitted December 2, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

WATKINS, J. This action is for the sum of twenty thousand dollars damages, brought by plaintiffs for the reparation of the injuries suffered and inherited by them in the death of their son, through the fault, negligence and want of due care on the part of these defendants—their claims being made against the three defendants *in solido*.

The cause having been submitted to and tried by the judge, there was a decree rendered in favor of the plaintiffs and against the defendants *in solido* for the sum of five thousand dollars, and the latter have appealed—the plaintiffs having answered the appeal, and prayed for the amount of the judgment to be raised to the full sum demanded in their petition.

For the purpose of being exact, and correctly stating the issues, we have extracted from the brief of counsel for New Orleans & Northeastern Railroad Company, the following summary of the pleadings (Brief, pp. 1 to 4), viz.:

“The petition avers:

“Petitioners are informed, and believe, and so aver, that the

New Orleans City & Lake Railroad Company owns the franchise, track and equipment of the electric line of street cars, usually known as the Levee and Barracks Line, running along Levee and Enghien streets, and other public streets and highways in New Orleans, and it and the Traction Company (aforesaid) have a common management and control, and jointly operate said line, and have a joint interest therein, and the Traction Company, with the consent and under the direction of the said New Orleans City & Lake Railroad Company negligently and unskillfully put up and erected a guy wire across the public street and public levee, and across the tracks of a steam railroad company, lawfully laid along the public levee and along Levee street, a public street and highway at the foot or intersection of Enghien street, with the levee and Levee street, so close to the ground as to obstruct the free passage of cars and vehicles with high load, and so close to the ground as to be dangerous to the life of brakemen on freight cars passing under it. The said steam railroad track had been there on the public highway and was itself a public highway for a long number of years, and it was negligence to place a strong guy wire across the said highway and track where large freight cars loaded with furniture and bulky articles were well known to be constantly passing, and so close to the ground as to be a constant source of danger to brakemen, who, in the discharge of their duties, are obliged to be on the top of the cars.

“ ‘The New Orleans & Northeastern Railroad Company is liable, because it was its duty to its employees and all others in like situation to prevent the said wire being stretched in a dangerous position over its track, and to compel its immediate removal. The wire had been there a sufficient time for the said railroad company to compel its removal, and it was negligence in said company to run freight cars under said wire, with brakemen on top of said cars.

“ ‘The said Traction Company is liable, because it placed the wire across the public highway in so dangerous a manner, and is interested and joins in the operation and use of the line of electric railway, of which the said guy wire is a part.

“ ‘And the New Orleans City & Lake Railroad Company is liable, because it owns the said franchise and line aforesaid, procured the Traction Company to erect it, as its agent. The servants and agents of the defendant were warned of the dangers of the guy wire several

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weeks before it resulted in the death of petitioner's son, who, on or about 18th February, 1896, was in the performance of his duties as brakeman on a freight car of the New Orleans & Northeastern Railroad Company, and in its service, which was being propelled rapidly along Levee street when, just as he arose from his brake, his head struck this guy wire above described and knocked him off the car, and he was horribly mangled; and after suffering great pain of body and mind, he died. He contributed to the support of his parents, and they had a legal right to be supported by him. He was a steady, faithful, industrious boy, or young man. For his suffering, pain and agony of body and mind petitioners claim fourteen hundred (\$1400) dollars; for funeral expenses, one hundred (\$100) dollars; for their own loss of the comfort and support of their son, eighteen thousand five hundred (\$18,500) dollars.'

"The answer of the N. O. & N. E. Ry. Co. is as follows:

"And now into court comes, by its president, C. C. Harvey, the N. O. & N. E. R. R. Co., made one of the defendants herein, and for answer to the plaintiff's petition, denies all and singular the allegations thereof, except in so far as may be hereinafter admitted.

"It admits that Ernest Erslew, on or about the time stated in plaintiff's petition, lost his life by falling from a train of freight cars being operated by this respondent, and which cars passed over the said Erslew, thereby killing him.

"But your respondent specially denies that said accident and resulting death was caused in any manner by its fault, unskillfulness or negligence, or that of its servants or employees.

"And further specially answering, respondent avers that the guy wire referred to in plaintiff's petition was perfectly visible, that said Ernest Lewis Erslew knew of its location and had been frequently warned in respect thereto.

"That he knew of the danger due to the location of said wire, both actually and presumptively, by reason of the patent and visible nature of the risk; that he had been frequently warned not only concerning the location of said wire, but of the danger to which said location exposed him and others.

"That he had many times, both on the day that he lost his life and many days prior thereto, frequently passed under said wire; that said wire and its location came within the risk assumed by him in virtue of his employment, and that he contributed to the injuries resulting in his death by his own negligence and imprudence.' "

The following is a brief summary of the points made and relied upon by the Traction Company and the City & Lake Railroad Company, as the following extracts from their counsel's printed argument will show, viz.:

" 1.—GENERAL STATE OF THE CASE.

"To justify a judgment for plaintiff in this case two things must occur: Negligence on the part of defendant causing the accident; absence of negligence on the part of the deceased contributing to the accident. No matter how gross the fault or negligence of defendants, plaintiff can not recover if the evidence shows that the accident could have been avoided by the exercise of ordinary care and attention by the deceased, or if the evidence shows that the accident was due, *in any degree*, to heedlessness or inattention on the part of the deceased.

"These defendants mainly rely upon the fact, established by the uncontradicted evidence, that the deplorable death of young Erslew was due, in part, to his inattention to a danger which was patent and visible; to his forgetfulness of a danger with which he was familiar, and of which he knew and had been warned—a danger he could have easily escaped had he not been inattentive and forgetful. This defence is wholly independent of the fault or the negligence charged against these defendants. It would suffice to defeat recovery, though we admitted, or the court found to have been established, every fault or negligence which plaintiff has charged us with.

"The case is a very simple one. There is little or no conflict of evidence, and little or no room for controversy over the law applicable thereto.

"In September or October, 1895, the New Orleans Traction Company, Limited, one of the defendants, strung a guy wire across some railroad tracks on the levee. The height of this wire was such that a man standing on the top of certain kinds of freight cars, in frequent use on the Northeastern Railroad, would have to duck his head in order to avoid being knocked off the car.

"This wire was a half inch in diameter, and was plainly visible for some distance. One of the plaintiff's witnesses said that it could be plainly seen nearly a hundred yards off. All of his witnesses saw it plainly at the time of the accident while standing across the street a considerable distance off.

"The accident occurred in February, 1896. During the whole period of the existence of the wire across the Northeastern track plaintiff's son had been in the employ of the Northeastern Railroad Company. His duties required him to stand on the top of cars and to pass daily under the wire. He knew of the location of the wire and was familiar with the necessity and means of avoiding it by ducking his head, not only because it was patent and visible, but because he had been specially warned and cautioned in respect thereto. The uncontradicted testimony of two train crew foremen, under whom the deceased had worked at different times, established that his attention had been called to the danger of the wire and that he had been warned in respect thereto. The danger was obvious; the means of avoiding were also obvious and easy to observe."

Pages 1 and 2 of brief.

To epitomize, plaintiff's theory is that the Traction Company and City & Lake Railroad Company, being under joint management and control in the construction and operation of the lines of street railway in the city of New Orleans known as the Levee & Barracks, amongst others, which extends along Levee and Enghien streets, and other public highways of said city, negligently and unskillfully put up and erected a guy wire across the tracks of the Northeastern Railroad Company which had been theretofore laid along the public levee and adjacent to Levee street, at the foot of Enghien street, so close to the ground as to be dangerous to the lives of brakemen on freight cars passing under it.

That it was negligence to place such a guy wire across the said highway and track where large freight cars were well known to be constantly passing; and "so close to the ground as to be a constant source of danger to brakemen, who in the discharge of their duties, are obliged to be on the top of the cars."

That it was negligence on the part of the Northeastern Railroad Company, and it is liable because it did not prevent the construction of a guy wire so situated and in such a dangerous position over its track; and further, because it did not compel the Traction Company and the City & Lake Railroad Company to remove this dangerous obstruction.

That, knowing of the construction and maintenance of this dangerous obstruction, it was negligence on the part of the Northeastern Railroad Company to run its freight trains under it constantly

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and customarily, to the imminent danger and peril of the lives of its brakemen whose duties required them to remain upon the roofs of said cars.

That at the time of the accident which caused the death of their son he was engaged in the performance of his duties as brakeman on one of the freight cars of the Northeastern Railroad Company, and in its service while it was being propelled rapidly along the track, when his head coming in contact with the said guy wire, he was knocked off, felled to the ground and killed.

The common defence of all the defendants is want of fault and negligence on their part and contributory negligence on the part of plaintiff's son, in that the guy wire was easily and plainly visible, and could have been readily seen and avoided by plaintiff's son had he paid proper attention, and that he had been frequently advised of the danger and warned against it, and that he had frequently passed under this wire while engaged in the daily performance of his duties as brakeman, and thus assumed the risk of danger therefrom as an incident of his employment.

In other words, that the plaintiff's son was guilty of contributory negligence by reason of his inattention to or forgetfulness of a danger incident to his employment, and which he might have avoided by the exercise of due care and attention.

The facts are few and simple and in the main the witnesses agree.

A fair summary of them is as follows, viz.:

That the accident happened on the 18th of February, 1896, while young Erslew was standing on the roof of what is designated in the evidence as a California fruit car from the Southern Pacific Railroad, as it was attached to a train of freight cars which was passing on the track of the Northeastern Railroad Company, when he was struck by an overhead wire of the New Orleans Traction Company and City & Lake Railroad Company, felled to the ground and killed almost instantly.

The accident was witnessed by two or three persons who were on the sidewalk near by at the time, and whose testimony is in the record. They agree in the statement, that it occurred in the morning at 7:25 o'clock, and that young Erslew "partly turned his head, his back (being) toward the river, so the wire (caught) him, and (he) went down between the cars;" that is to say, between the first and second cars in the train.

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His position was "on the rear end of the first car" when the accident happened, and his face was toward the woods, though slightly averted, and his back toward the levee, thus being in a station at right angles with the course of the train, which, at the time, was going south, the railroad track running, at this point, almost parallel with the levee on the Mississippi river, and between it and the Levee & Barracks street railway track.

The overhead wire "struck him right above the shoulder, under the neck."

At the time of the accident young Erslew was in the employment of the Northeastern Railroad Company as a switchman and brakeman, whose duty it was to couple cars; and, while thus engaged, to work on the roof of cars as well as below.

A very clear statement is made by one of the Northeastern Railroad Company's employees—the switch foreman, or foreman of the switch gang or crew.

In substance he says:

That he was in charge of the train on which young Erslew was, on the day of the accident, as foreman of the crew.

That young Erslew's duty was to obey signals given him by the engineer. He was the only man the engineer could see; and for that reason he was stationed on the head of the train. Erslew occupied such a position as would enable him to see the foreman in the rear, on the ground, at the same time.

It was Erslew's business to watch both the engineer and foreman, and catch their signals, and to signal to each one of them in return.

The following excerpt from this witness' interrogation gives a clear view of the situation:

"Q. What was he"—young Erslew—"doing on the day he was killed?

"A. Obeying signals. I instructed him to get on the head car. He was working with engine 219; and the engineer on the lower end of the yard was working engine 201; and I told him to get on top of the fruitcar so he could give us the signals from the rear end. We were pulling out from track 9 to go on track 10 to pick up a caboose."

On being asked if he (witness) knew of the guy wire which caused Erslew's death, he answered in the affirmative.

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Same witness repeats this statement and says that the guy wire "would not clear a man standing on a high car, but if a man was standing on an ordinary freight car, it would clear him."

On being asked what he would do when he passed under this guy wire, answered that he "*stooped sometimes; if he was standing on a high car he would have to stoop.*"

This witness says that young Erslew had been in this "service of the company about five or six days before this accident happened, and that he notified him about the guy wire about that time. That he told him to "look out for the wire at Enghien street and the levee; that it was too low and would not clear a man standing on the top of the car," and that he told him that he (witness) "*had to stoop several times to keep from getting knocked off the cars.*"

That after this notification young Erslew had occasion to pass under that wire frequently; sometimes as often as eight or ten times a day.

This witness states that the car young Erslew was on was "a very high car—the highest that is used;" and other evidence in the record establishes the fact that it was a California fruit car of very large dimensions, and much higher than the ordinary freight car is.

That it measured thirteen (13) feet five (5) inches and one-fourth ($\frac{1}{4}$) from the top to the railroad track.

This witness says: "That is what is called an average height of the fruit car, but that the ordinary box car runs from eleven (11) feet six (6) inches up to this height."

That "taking box cars as they run (they are) about twelve feet," that is to say eighteen (18) inches lower than California fruit cars are.

The guy wire was attached at one end to an iron post planted in the levee of six (6) feet in height, and it extended to a post on the levee side of Enghein street, which was twenty-one (21) feet in height, passing over the track of the Northeastern Railroad Company at a height of eighteen (18) feet three (3) inches.

It thus appears that from these estimates there was an intervening space of a little more than six feet between this guy wire and the ordinary box car; and between it and the average fruit car of only four (4) feet and ten (10) inches.

Manifestly, then, this wire was so constructed as to pass box cars of the average height of twelve feet, and leave a space between

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sufficiently great to clear a man standing on the roof of six feet in height, but not so as to clear a man of only five feet in height standing on the roof of a fruit car.

Applying these estimates—and they were made by an employee of the Northeastern Railroad Company and not disavowed by either of the other defendants making common cause—to the preceding statements of the witnesses, it seems clear that the blame is fairly placed upon the defendants, and that young Erslew in no manner contributed to the accident.

At the time of the occurrence he was standing on the roof of the forward car of a freight train while it was in motion, and at the rear end where the foreman of the switch crew had assigned him a position, so that he could give the signals to the engineer as well as to him.

At the time of the accident the witness occupied a position on the ground near by, and the train was being "pulled out from track 9 to go on track 10 to pick up a caboose," when the guy wire "struck Erslew right above the shoulders under the neck."

Evidently, the accident would not have happened if young Erslew had been upon an *ordinary* freight car, and there is no evidence that he had, during his brief period of employment of *six days*, ever been called upon to occupy a *fruit* car, or that he was advised or knew of the difference or the height of the cars.

Though many of the witnesses were interrogated on the point, there was no one who stated that Erslew had ever had occasion to stoop down in order to avoid the guy wire as the foreman had done.

From all the evidence it is evident that the Traction Company and the City & Lake Railroad Company, in the first instance, erected the guy wire at least eighteen inches lower than it should have been in order that fruit cars of average height could be passed beneath it with safety to the operators and employees of the Northeastern Railroad Company, and they were consequently negligent, and that, in permitting this guy wire to be thus erected over its track and subsequently maintained, to the great danger of its employees, was negligence on the part of the Northeastern Railroad Company.

The attention of the servants and agents of the Traction Company was attracted to the improper height of the guy wire at the time of its erection, and full knowledge of this defect and the danger it threatened to its employees was repeatedly brought home to the

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Northeastern Railroad Company through the subaltern officers of the corporation to whom the management of its trains are entrusted and by whom the employees and operatives are governed and directed.

This knowledge is fully disclosed by the testimony of the defendant's witnesses and their employees.

Notwithstanding this guy wire may have been visible, and young Erslew had been warned of its existence and dangerous character, there is nothing to show that he had, on any occasion, to stoop down in order to avoid it, and for that reason was not aware of that necessity, but, on the contrary, having had occasion frequently to pass under the wire while engaged in his daily avocation on the roofs of *ordinary* box cars, without the necessity of stooping, the evident inference is that he did not deem it necessary.

It can not be said, in view of these facts, that the accident was due, in any part, to the forgetfulness of, or inattention to, a *known* danger, which might have been avoided by the exercise of due care and proper caution on the part of the deceased.

Having entered this service only a few days before the accident, is a circumstance strongly corroborative of this theory.

Forgetfulness of a known danger is treated by some authors and courts as contributory negligence, but it will be necessary to produce and analyze the authorities in order to sustain their applicability to the instant case.

The effect of voluntary exposure to danger is thus stated by Beach on Contributory Negligence, Sec. 27:

"While it is unquestionably true that one may voluntarily and unnecessarily expose himself or his property to danger without thereby becoming guilty of contributory negligence, as a matter of law, it is, nevertheless, an established rule that where one does knowingly put himself or his property in danger there is presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct, as where one goes voluntarily upon a railway track, without keeping watch, at a point where it is known to be especially dangerous, or ventures upon a bridge, track, or highway which he knows to be defective or unsafe; and where one knowing the danger temporarily forgets it, and in consequence suffers, his forgetfulness will not avail him as an excuse. What he knows he must remember at his peril, and not to remember is contributory negligence if it occasions injury."

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And, in affirmance of the principle announced by Mr. Beach, we have made the following selections from the brief of the counsel for the Traction Company and the City & Lake Railroad Company, viz.:

"So, in the case of Walker vs. Town of Reedsville (N. C.), 2 S. E. Rep. 74, where plaintiff was suing to recover damages from falling into an open pit near a highway which had been negligently left without guard or rail, it was proved that plaintiff knew of the existence of the pit, but had forgotten it at the time. The court said:

"A reasonably prudent and careful man would not forget the presence of such a danger in his immediate neighborhood, one he had seen and observed every day for more than a fortnight, and but a few hours before he received the hurt. He was bound to act upon his information, and to use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot and failed to be careful at his peril, and in his own wrong."

In the conspicuous case of Butterfield vs. Forrester, 11 East 60. Lord Ellenborough said:

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary care to be in the right. * * * One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Again:

"Applying the foregoing principles to overhead structures it is said in 3 Woods on Railroads, Sec. 379, p. 1747:

"But where the servant knows, or ought to know of the obstruction, he can not recover for an injury received therefrom, because by reason of his failure to guard against it, and neglecting to do so, he is treated as being guilty of contributory negligence."

The following is the entire *syllabus* or head-note of the case of *Williams vs. Edl. & W. R. Co.*, New York Court of Appeals, 22 N. E. Rep. 1117. It correctly states the facts and conclusions of the court:

"In an action by a brakeman against a railroad company for personal injuries received by being struck by a bridge while standing on the roof of a freight car while engaged in his work, it appears from the plaintiff's evidence that the bridge was too low for him to pass

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under while standing upright; that he was familiar with the bridge and was standing with his back to the engine when he knew that the train was about to pass under the bridge. *Held*, that the plaintiff's testimony showing contributory negligence, defendant's motion for a non-suit should have been granted."

In *Brossman vs. Lehigh Valley Railroad Company*, 13 Pa. St. 490, the conclusion of the court is thus stated, viz.:

"Decisions, in accord with those cited are multitudinous, and the able counsel for plaintiff has adduced none to the contrary. They are too well grounded to be overruled, save by legislative power. When the hazards incident to the duties of the employees are open before his eyes, meet him every day of his services, and would knock him down if he did not stoop to avoid them, and he continues in the service without promise of amendment, clearly he accepts the risks of the situation. It is no matter whether danger signals are on other roads, for he was not deceived as to the degree of danger he incurred."

Again:

"In *Rains vs. St. Louis, etc., Railroad Company*, 71 Mo. 164, the head-notes correctly state the facts and the conclusion of the court, as follows:

"A railway company is not bound to see that a foot-bridge crossing the line is at a height sufficient to enable brakemen to pass under it safely while standing upright on the top of freight cars; and if a brakeman is thus killed while in this position, being familiar with the situation and the danger, his own negligence contributes to his death, and there can be no recovery."

To the same effect is the case of *B. & O. R. Co. vs. Stricker*, 51 Maryland, 47, where it was held:

"A conductor of a railroad train, while standing on the top of a car in motion, in discharge of his duty, was injured by being brought in contact with a low bridge. He had been well acquainted with its position and character and accustomed to pass under it. *Held*, that the company were not liable in damages."

In *City of Vicksburg vs. Hennessey*, 54 Miss. 491, the court declared:

"The universal rule in this class of cases is that the injury must proceed wholly and solely from the defective highway; that the plaintiff must be entirely free from any negligence which con-

tributed to the result, and that the burden of showing affirmatively that he exercised at least ordinary care and prudence is upon him. Unless he establishes this, he must fail, notwithstanding he has shown the greatest remissness on the part of the corporate authorities."

In *Wilson vs. Charleston*, 8 Allen, 137, it was held that "a person who voluntarily attempted to pass over a sidewalk which he knew to be very dangerous by reason of ice upon it, which he might easily have avoided, could not maintain an action against the town, which was bound to keep the way in repair, to recover judgment for injuries sustained by falling upon the ice. * * * While the proper degree of care is required from the county, so on the other hand, at least ordinary care is required from the traveler. He can not shut his eyes against apparent dangers, and drive recklessly along the highway. He is bound to keep his eyes open, and maintain a proper degree of watchfulness against danger. *Hubbard vs. Concord*, 35 N. H. 52). * * * In an action against a town or county for injuries resulting from defects in the highway, it is generally a good defence to show that the plaintiff was himself guilty of contributory negligence."

Giving to the foregoing opinions the widest scope and possible applicability, they proceed upon the principle that the injured party had *knowledge* of the obstacle or defect, and by the exercise of due care and caution he could have avoided it. Of course, that is true in a limited sense, and the rule applies to one who is "familiar with the situation and the danger," and negligently fails to avoid it; but it can not be assumed, under the facts of this case, that the deceased was possessed of sufficient knowledge of the danger as to justify the presumption that he undertook all the risks reasonably to be apprehended.

But the correctness of the doctrine announced in the foregoing authorities has been seriously questioned by courts of great ability.

In the recent case of *Simonds vs. City of Baraboo*, 67 Northwestern Reporter, 40, the Wisconsin Court said:

"Beach lays down the rule (Section 12) in effect, that where one knows the danger, but temporarily forgets it, and in consequence suffers an injury, his forgetfulness will not avail him as an excuse; that what he knows he must remember at his peril; and that a failure to remember constitutes contributory negligence, if it occasion injury.

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"But this opinion is not supported by reputable authorities anywhere, and has been expressly repudiated by this court. *Wheeler vs. Town of Westport*, 30 Wisconsin, 392."

The doctrine announced by Mr. Beach is mainly grounded on an opinion of the Massachusetts court in *Gilman vs. Inhabitants of Durfield*, 13 Gray, 577, but the Wisconsin court said in *Wheeler vs. Westport*, *supra*, that that court had "carried the doctrine of forgetfulness" too far.

And the court proceeded to say in the *Simonds* case:

"In fact the rule of *Gilman vs. Inhabitants of Durfield* has been so fenced in by subsequent decisions as to be practically overruled," citing: *Smith vs. Lowell*, 6 Allen, 39; *Whittaker vs. West Boylston*, 97 Mass. 273; *Blood vs. Tyngsborough*, 103 Mass. 509; *Bringham vs. Worcester Co.*, 147 Mass. 446; *Weed vs. Village of Ballston Spa*, 76 N. Y. 329; *Bassett vs. Fish*, 75 N. Y. 303; *Driscoll vs. Mayor, etc.*, 11 Hun. 101; *Dorsey vs. Construction Co.*, 42 Wis. 583; *Cuthbert vs. Appleton*, 24 Wis. 388.

To these cases may be added the following, viz.: *Alcorn vs. Railroad*, 108 Mo. 81; *Snow vs. Railroad*, 8 Allen, 441; *Plant vs. Railroad*, 6 N. Y. 607.

In *Gardner vs. Railroad Company*, 130 U. S. 349, the Supreme Court cited and approved the opinion expressed by the Massachusetts court in *Snow vs. Housatonic Railroad*, 8 Allen, 441, and said:

"The Supreme Judicial Court of Massachusetts held that the defendant was not relieved of its liability to the plaintiff by reason of any relation which subsisted between him and it at the time of the accident arising out of the employment in which he was engaged; because, among other reasons, it did not appear that the defect in the road was the result of any such negligence in the servant as to excuse the defendant, but was caused by a want of repair in the superstructure between the tracks of the defendant's road, which defendant was bound to keep in a suitable and safe condition, so that plaintiff could pass over it without incurring the risk of injury."

And the court then said: "We regarded this doctrine as so well settled that in *Texas & Pacific Railway Company vs. Cox*, 145 U. S. 593, we contented ourselves, without discussion, with a reference to some of the cases in this court upon the subject."

In *Whittaker vs. Inhabitants of West Boylston*, 97 Mass. 273, it was held that "the fact that a person injured by reason of a defect

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in a highway had previous knowledge of the defect, is not conclusive evidence that he was wanting in due care at the time of the accident."

In *Wood vs. The Village of Ballston Spa*, 78 N. Y. 329, the court said:

"The defence that there was contributory negligence on the part of plaintiff rests mainly upon the fact that the plaintiff was familiar with the street, and on several occasions before the accident had seen the excavation, and the argument is that he ought to have avoided driving into it. But we think the question of the plaintiff's negligence was one of fact, and the finding of the referee thereon can not be disturbed. In general, a person traveling upon a highway is justified in assuming that it is safe. The plaintiff, although he had known of the excavation, might not remember *its exact location*, or the fact may have been forgotten."

And upon an examination and due consideration of the whole case the court held:

"Under the circumstances the defendant was properly chargeable with notice of the existence of the excavation and with negligence in not abating the nuisance, or so guarding the excavation as to prevent the accident to persons using the street."

But with regard to their obligation of due care and caution less strictness in the observance is imposed upon an employee than on a mere stranger sustaining no contract relations to the person or corporation inflicting an injury.

But the important question as to the amount and character of knowledge an employee of a corporation must possess of the existence of a dangerous structure to constitute contributory negligence, as a question of fact, was settled in *Dorsey vs. The Phillips & Colby Construction Company*, 42 Wisconsin, 583, in which the court say:

"If he knew, or ought reasonably to have known, the precise danger to him, in the course of his employment, of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk as well as the ordinary risks of his service.

"The authorities cited by learned counsel for the appellant all agree in the general proposition. But it appears to us that this consequence of acquiescence ought to rest upon *positive knowledge*, or reasonable means of positive knowledge of the precise danger assumed, not on vague surmises of the possibility of danger."

Again:

"And it appears to us very doubtful whether persons operating trains and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the *precise relation* of such subjects to the track. And even with actual notice of the dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain *constantly in their minds* an accurate profile of the route of their employment and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects.

"In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train, to their own safety in performing it."

That was the case of an employee of the defendant being injured by being carried against a cattle-chute while, in the course of his employment, he "was ascending by a side ladder to the top of a freight car in motion"—the charge being "that the cattle-chute was negligently, unskillfully and improperly constructed so near the defendant's track as to endanger the persons and lives of the defendant's employees operating freight trains over its road at that place."

The jury found a verdict in favor of the plaintiff for five thousand dollars for the personal injuries he received, and the Supreme Court affirmed it.

The foregoing principles have been fully and well stated by this court in *Myhan vs. Electric Light Company*, 41 An. 961, thus:

"Based on sound reason and sheer justice, the law as expounded by jurisprudence is clear that it is not contributory negligence to engage in a dangerous occupation; * * * that the risk assumed by the servant is the ordinary hazard incident to the employment, and this is synonymous with unavoidable accident; * * * that unless the act is necessarily and inevitably dangerous, no negligence can be imputed; that the servant has a right to rely on the care and the superior knowledge, information and judgment of the employer, and to act upon the presumption that the latter would not expose him to unnecessary risk and has taken all necessary precaution; that the employee is not bound to inquire as to latent, but only patent defects, and that he has the right to presume that this inquiry has

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been made by the employer, upon whom the duty devolves, and although the servant may know of the defects, this will not defeat his claim unless it is shown that he knew that the defects were dangerous," etc.

In *Wilson vs. Telephone and Telegraph Company*, 41 An. 1041, the plaintiff sued the defendant for damages "for injuries sustained by a guy wire erected for the purpose of supporting the posts of the company," and, in our opinion, we said: "The Telephone and Telegraph Company had an undoubted right to erect poles and secure them, but this permission did not authorize them to put them up and to secure them by wires so strung as to endanger human life."

In our opinion both the law and the evidence support the plaintiff's claim, and, that as a question of fact, sufficient knowledge on the part of the deceased is not established to justify the assertion, that he had assumed the risk of danger from the guy wire, and was, consequently, guilty of contributory fault whereby the defendant, are exonerated.

The proof shows that the deceased was a young man of nineteen or twenty years of age, strong and vigorous. That from his wages he contributed to the support of his parents. That by the accident he was not instantaneously killed, but, that after being knocked off the car, he fell between the one he was standing on and the next one thereto, and his limbs, passing under the car wheels, were badly mangled and he soon after died. That while living he must have suffered great pain of body and mind.

The plaintiffs being his father and mother his forced heirs.

Under the circumstances we are of opinion that the plaintiffs are entitled to recover, as the forced heirs of the deceased, the sum of two thousand five hundred dollars as damages for the pain and agony suffered by their son, and, also, in their own right, for the loss of his services, comfort and support. *Perez vs. McMahon and Railroad Co.*, 47 An. 1891.

It is therefore ordered and decreed that the amount awarded by the judge *a quo* be reduced to the sum of two thousand five hundred dollars, and that as thus amended same be affirmed, the costs of appeal being against the appellee.

 State on the relation of Recorder.

No. 12,357.

THE STATE OF LOUISIANA ON THE RELATION OF O. A. TAQUINO
VS. LOUIS ARNAULD, RECORDER.

The recorder's court in the city of New Orleans, in enforcing Ordinance 12,755, can not impose a greater term of imprisonment than thirty days. The imprisonment for non-payment of the fine imposed, added to for violation of the ordinance, can not exceed thirty days.

Act 47 of 1890 limits imprisonment for the violation of each offence to thirty days.

ON APPLICATION for a Writ of *Certiorari*.

Chandler C. Luzenberg for Relator.

Respondent *in propria persona*.

Submitted on briefs December 19, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

MCENERY, J. The relator was convicted before the respondent's court for violating Ordinance No. 12,755. He complains that the respondent exceeded his authority in imposing the penalty upon him under Section 3 of the ordinance.

Section 3 is as follows:

"That whoever shall violate the provisions of this ordinance shall, upon conviction before the recorder within whose jurisdiction the offence is committed, be condemned by said recorder to pay a fine not to exceed twenty-five (\$25) dollars, or imprisonment in the parish prison for a term not to exceed thirty (30) days, or both, or imprisonment in said parish prison for a term not to exceed thirty (30) days in default of the payment of said fine; *provided, that the fine shall not exceed twenty-five (\$25) dollars for each offence, nor the imprisonment more than thirty (30) days.*" (Italics ours.)

The sentence imposed upon relator was to pay a fine of twenty-five dollars, and to be imprisoned for thirty days in the parish prison, and in default of the payment of the fine, to be imprisoned an additional thirty days.

Tax Collector, etc., vs. Bank.

The relator applied for and obtained a writ of *certiorari* that the validity of the penalty might be inquired into. State *ex rel.* Joseph vs. Bringier, Recorder, 42 An. 1097.

The *proviso* in the ordinance limits the imprisonment in each offence to thirty days. Fine and imprisonment may both be imposed, but the length of the imprisonment can not exceed thirty days. The additional imprisonment for non-payment of the fine added to that imposed for the violation of the ordinance can not exceed thirty days.

Act 41 of 1890 limits the term of imprisonment to be imposed by the ordinances of the city, for their violation, to thirty days.

The sentence and judgment are avoided and reversed and the case remanded in order that sentence may be imposed according to law.

No. 12,284.

C. H. PARKER, TAX COLLECTOR, ETC., VS. SHAREHOLDERS OF CITIZENS
BANK OF LOUISIANA.

The Citizens Bank was not in due form made a party to the rule.

In consequence the service made of a copy of the rule was not a legal service upon it to surrender the shares of its shareholders to be sold for taxes or pay the taxes.

The judgment is annulled and the rule dismissed, as in case of non-suit.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

M. J. Cunningham, Attorney General, and Frank C. Zacharie for
Plaintiff, Appellant.

Henry Denis and Branch K. Miller for Citizens Bank, Defendant,
Appellee.

Argued and submitted December 5, 1896.

Opinion handed down January 4, 1897.

Rehearing refused January 18, 1897.

The opinion of the court was delivered by

BREAUX, J. The tax collector, by way of rule, proceeded against

Tax Collector, etc., vs. Bank.

the shareholders of the Citizens Bank to produce their shares in order that they may be sold for the payment of taxes claimed by the plaintiff as due thereon.

The bank was not made a party to the rule.

It is alleged in the rule that plaintiff can not make a seizure of the property for the taxes assessed against it because of the nature of the property assessed, and because it is in the possession of the shareholders who sold these shares in such a manner that the plaintiff can not seize them.

There is no mention made of the bank, as the one upon whom the duty devolved, of producing these shares or of paying the taxes.

The exception to the rule applying to this point was that the bank has not been cited or notified.

The service by the sheriff shows that a copy of the rule to produce property was served "on the shareholders Citizens Bank of Louisiana, defendant, by leaving the copy in the hands of the cashier," the other officers being absent.

This was followed by another service (based upon the rule, presumably) on the bank, notifying it to deliver up to the State Tax Collector shares in the capital stock of the bank liable for State taxes. This notice was signed by the tax collector. The rule did not make the bank a party to the proceeding, nor the service of the copy of the rule by the sheriff; it follows that the service of the tax collector's notice did not have the effect of calling the bank as a party.

This rule is silent as to the bank, and no service has been made upon it. In consequence we think that the judgment should be reversed.

A second point was argued which we consider equally as fatal to the appeal, that is, that the shares were not assessed to the shareholders as required by the statute.

We will not discuss the last proposition, for the reason that the first ground of exception pleaded in the alternative must, in our view, be sustained.

The judgment is null for the want of notice or citation, and because appellee was not a party to the proceedings.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and the same is annulled, reversed and avoided.

The rule is dismissed in both courts, as in case of non-suit.

Plaintiff pays the costs.

Succession of Vanhille.

No. 12,281.

49	107
107	123

SUCCESSION OF CAROLINE VANHILLE.

The amount of a legacy in an olographic testament being expressed in figures does not invalidate the donation.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Perrault, J.*

Kenneth Baillio for Legatee, Appellee.

Gilbert L. Dupré for Opponents, Appellants.

Submitted on briefs December 14, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

WATKINS, J. The sole question in this case is whether a legacy in an olographic will expressed in figures is valid, and it is presented by an opposition on behalf of certain heirs by representation of the testator.

We make the subjoined extract from the brief of opponent's counsel, viz. :

"The deceased made an olographic will containing sundry legacies, among others, the following one, viz.: 'Je donne mon argenterie et *three hundred dollars* de plus que ce qu'il doit heriter de ma succession a mon dernier fils Lucius G. Dupre.' (Italics ours.)

"The opponents contend that this donation is not made in conformity with law, and is, therefore, null and void."

Our Code prescribes the following form for an olographic testament, viz. :

"The olographic testament is that which is written by the testator himself.

"In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form," etc. R. O. C. 1588.

The language of the French Code is almost identical with that of our Code.

Succession of Vanhille.

"An olographic will shall not be valid unless it is written throughout, dated and signed by the testator," etc.. C. N., Art. 970.

To be valid, this kind of a testament must be "written throughout," or "entirely written by the hand of the testator."

But this article is closely coupled with another found in the section which treats "of the opening and proof of testaments, which declares that "the olographic testament * * * must be acknowledged and proved [by the declaration of two credible persons, who must attest that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his lifetime." R. O. C. 1855.

The latter article explains that the words of the former, "entirely written by the hand of the testator," mean "entirely written in the testator's handwriting."

The transcript shows that this provision of the law was complied with, and the fact established that the testament was entirely written in the handwriting of the testator.

This last article has been so amended as to require the judge *a quo* "to interrogate witnesses under oath touching their knowledge of the testator's handwriting and signature, and (to) satisfy himself that they are familiar therewith," etc. Act 119 of 1896.

And these essentials having been complied with, the will should have been admitted to probate. The judge *a quo* did admit it to probate in so far as its probate was not opposed; and subsequently overruled the opposition and probated it in its entirety, and opponents have appealed.

These articles were dealt with and interpreted in *Fuentes vs. Gaines*, 25 An. 85; and *Succession of Roth*, 31 An. 315.

We are not aware of any decision of this court in which this precise question has been decided; but the French authorities have put the question at rest.

"At the moment," one author says, "that the testament is written in its entirety in the testator's hand, it avails for the purpose, whatever the manner it is written, and whatever the substance on which it is written. Therefore, that it is found on paper, parchment, cartoon paper, or of linen; whether written with ink, blood or any other liquid, or written with a pencil; whether the will be expressed in abbreviations or quantities—i. e., amounts fully expressed, or in figures, etc., is of no importance, if, irrespective of this, the will can be read—all that is requisite."

Johnson vs. Pessou.

4 Marcade Explanation du Code Napoleon, p. 6; C. N., Art. 970;
3 Troplong Comms.

And in the annotations of another author on the Code Napoleon a number of commentators are quoted to the same effect as the foregoing extract from Marcade, viz.:

Pothier on Donations and Testaments, Ch. 1, Art. 2, Sec. 2; Merlin Rep., vo. Testam., Sec. 2, par. 4, Art. 3, N. J.; 1 Duranton, Tr. 9, n. 51; Coin Delisle, n. 16.

Vide Gilbert Codes Annotes, p. 427, No. 43—interpreting Code Napoleon, Article 970.

We are of opinion that the legacy is valid.

Judgment affirmed.

No. 12,286.

49	100
123	6

A. L. JOHNSON VS. A. O. PESSOU.

The wife borrowed an amount avowedly at the time for her use and benefit. She obtained a certificate from a competent judge, authorizing her to borrow the amount and executed a mortgage.
Evidence that the sum was subsequently received from her by her husband and used in his business will not invalidate the mortgage given to secure its payment.

The plaintiff became the mortgagee's transferee of the note secured by mortgage. Subsequently, the wife, to pay this mortgage and obtain an additional amount as a loan, sold the property mortgaged.

The vendee executed notes in payment. They were taken by the plaintiff in exchange with this vendee for the notes he, the plaintiff, held.

The vendee of this property afterward sold it to the husband.

The plaintiff made a second exchange, viz.: the notes he held for those of the husband, secured by vendor's privilege on the property.

These sales and mortgages were made and executed in due course of business, without any intimation of marital influence or wrong of any kind.

The action was to compel an adjudicatee to take title.

The wife called in the suit, in her answer pleads that she has no interest in the property.

The plea is sustained by the proof.

Third persons, in good faith, without notice who acquire rights in property thus transferred are entitled to recover the amount legitimately advanced.

APPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Dinkelspiel & Hart for Plaintiff in Rule, Appellee.

Johnson vs. Pessou.

John Dymond, Jr., and Branch K. Miller for H. B. Stevens,
Defendant in Rule, Appellant.

Argued and submitted December 16, 1896.

Opinion handed down January 4, 1897.

Rehearing refused January 18, 1897.

The opinion of the court was delivered by

BREAUX, J. The plaintiff sued out a rule upon H. B. Stevens, adjudicatee, to compel him to show cause why he should not comply with his bid and take title to the property seized and adjudicated to him in the executory proceeding in the case of the defendant in rule against A. O. Pessou, mortgage debtor.

The defendant in rule admits to have purchased the property, but represents that the title is not such title as he can be made to accept.

The property was acquired by Mrs. Carrie C. Newsom, wife of A. O. Pessou, from John McGraw. In the act of purchase she declared that she was separate in property from her husband, A. O. Pessou, and that the purchase was made with her own separate funds.

Subsequently she mortgaged it (after having obtained an order of one of the judges of the District Court, sanctioning the mortgage) to the extent of thirty-five hundred dollars, to a Mr. McQuade.

This was followed, some time after, by a sale to E. F. Henderson, for the sum of nine thousand dollars. In the act it is declared that twenty-five hundred dollars of the purchase price was paid, cash, and that the balance of the purchase price was represented by four promissory notes.

A. L. Johnson, the defendant in rule, acquired these mortgage notes.

It is also a part of the history of the case that subsequently E. F. Henderson transferred the property to A. O. Pessou, husband, for one hundred dollars in cash and seven thousand five hundred dollars in notes, which A. L. Johnson received in exchange for the notes he held, executed under the act of sale to E. F. Henderson, and at the same time he became the owner of an additional note representing the purchase issued by Pessou.

The defence of the defendant in rule is that the sale by Mrs. Pessou to Henderson was a disguised mortgage for the purpose of binding the wife's property for the payment of the debts of the husband and that the sale of the property by Henderson and Pessou was made for the purpose of transferring to the husband the property of the wife by the substitution and intervention of a third person contrary to a prohibitory law.

Further, that A. L. Johnson, holder of the mortgage notes, was well aware of all the acts and circumstances connected with each of the sales, and that he well knew from the first the purposes for which these sales were made and the notes executed.

In conformity with the prayer of the defendant in rule in the answer, Mr. and Mrs. Pessou were made parties to the proceeding.

No claim to the property is made in their answer. On the contrary, they aver that the sale made by Mrs. Pessou to E. F. Henderson was a legitimate *bona fide* sale, and that by the sale she lost all interest in the property and has not acquired any since; that the net proceeds were paid to her and disposed of by her; that she had never heard of the plaintiff prior to the rule filed in this case and does not know him.

The judgment was rendered in favor of the plaintiff in rule. The defendant in rule prosecutes this appeal.

The first amount, viz.: three thousand five hundred dollars, borrowed by the wife, was borrowed, we have seen, from McQuade, and a mortgage was executed after the requisite certificates had been issued authorizing the loan. The amount was received by her at the time the mortgage was executed. There is nothing in the evidence to indicate that it was the wife's intention, in borrowing the money, to apply it to the payment of the husband's debts.

Judicial authority to the wife, to make the mortgage, having been previously obtained, it was incumbent upon her, or upon those who invoke her right, to prove that it was well known to the mortgagee that her purpose was, in borrowing the money, to borrow it for the use of the husband. The mortgage furnishes full proof against her. The evidence utterly fails to show that the money she admits she received was borrowed with the knowledge of the mortgagee for the use of the husband. It was not incumbent upon the plaintiff to prove that this loan enured to her benefit. *Darling vs. Lehman, Abraham & Co.*, 35 An. 886, 889.

To this point there was no ground for argument. The testimony regarding this loan to the wife was clear and direct.

If the borrower, after the loan had been effected, changed her original intention as expressed at the time she obtained the certificate of the judge authorizing her to borrow, and handed the amount borrowed to her husband, to be applied to his use and benefit, in law and justice we think the lender's right should remain unaffected.

The plaintiffs loaned an amount to pay this indebtedness. One who loans a sum to pay a claim legitimately due to the extent of the amount loaned for the purpose, it must be held that there was ample consideration.

With reference to the remainder due by the wife, it became merged with the amount of her indebtedness incurred in paying the McQuade mortgage, in this wise:

She sold the property for the purpose of creating a vendor's lien, and to enable her to borrow the amount desired, and not with the intention, as alleged in the answer of the defendant in the rule (Stevens), of "transferring title from the wife to the husband by the substitution and intervention of a third party."

This sale was made for the avowed purpose of obtaining a loan. The notes representing the price were transferred to the plaintiff in due course of business. The evidence, in our appreciation, does not reveal that the plaintiff was guilty of negligence or that he had knowledge of the existence of irregularities warning him against the investment.

Paraphernal property is alienable. It results that the obligations validly contracted by the wife during marriage may be secured upon paraphernal property.

The amount for the notes representing the purchase was handed to her by the notary. We are informed by the testimony that it was for the wife's benefit, and that as to the plaintiff, he did not know that the property belonged to Mrs. Pessou.

Stress is laid upon the fact that small amounts were paid by the husband, who was the debtor to the plaintiff, and at the date of the first sale a small amount was paid to Henderson, who became the purchaser, to enable the wife to borrow the amount she borrowed. The testimony does not prove that these small amounts were paid from the sums borrowed by the wife. There is no testimony before us of the husband's insolvency. As between the husband and wife

such payments may be made from the latter's money without vitiating her contract, particularly when nothing indicates that the creditors knew that it was her money they were receiving.

The plaintiff, the statement of facts discloses, acquired the second set of notes, and surrendered therefor the first set; the second were executed by A. G. Pessou, who bought from Henderson.

They are the notes secured by the foreclosed mortgage, which resulted in the adjudication of the property to the defendant in rule.

Impressed by the argument of his counsel we paused at this point. It was only after careful attention we concluded that as to the third person in good faith the incumbrance on the property remains.

It must be conceded that the wife may sell her property.

Should it in the course of regular business transactions be acquired by the husband, third persons who have acquired rights on the property, in good faith without notice, should not be made to suffer.

The evidence does not reveal that a name was interposed as vendee of the wife in order to enable the husband to divest her of her title. The evidence does disclose that a sale was made by the wife in order that she might borrow money, and to that end offer as security notes with vendor's privilege.

The wife was called in this suit. In her answer she alleges that she has no interest in the property. The evidence sustains the verity of the answer.

The negligence of the plaintiff as charged by the adjudicatee, defendant (i. e., the defendant in rule, Stevens), and the warning it is urged was given by the paraph *ne varietur* on the notes are not as grave and serious as they appear at first blush.

The failure to examine the record under the circumstances was not of paramount importance.

In addition, confidence is not necessarily negligence.

Complicity of some sort, or notice of some kind of an actual or constructive wrong is required in order that one may be thereby affected in his rights.

The sole remaining question is whether nine hundred and sixty dollars paid to the sheriff should be credited in the judgment.

We think it should, and to that extent the judgment appealed from is amended.

It is therefore ordered, adjudged and decreed that the judgment

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appealed from is amended by allowing a credit of nine hundred and sixty dollars.

As amended the judgment is affirmed at appellee's costs in this court.

No. 12,310.

JOHN A. DUFFY ET AL. VS. THE CITY OF NEW ORLEANS ET AL.

The Board of Commissioners is not a Corporation.—Legislation resulting in the appointment of a board of commissioners with functions defined does not necessarily create a corporation, though vested with some of the essentials to the life of a corporation.

Appointment of the Members of the Board.—The members of a board of commissioners may be appointed by the executive in matter of property used by the general public, within the limits of a municipal corporation.

The Act is General in its Effect.—An act is general, within the meaning of the Constitution, when it relates to a general interest.

Not Without Due Process of Law.—Without resorting to the courts, the State may resume some control over property of which the general public has the use, without the necessity of, in the first place, resorting to the courts.

Authority Permissive and not Mandatory.—Without contravening any of the articles of the Constitution, a municipal corporation may be authorized to furnish the funds to pay the value of the property expropriated.

Actual Issues.—It is the function of courts to deal with actual issues. Those which may arise will not be anticipated.

The grounds urged are not of such a character as to permit the enforcement of the law in its entirety.

A PPEAL from the Civil District Court for the Parish of Orleans.
King J.

Rouse & Grant for Plaintiffs, Appellants.

Samuel L. Gilmore, City Attorney, for City of New Orleans, Defendant and Appellee.

Bernard McCloskey for Board of Commissioners of the Port of New Orleans, Defendant, Appellee.

Argued and submitted December 1, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 18, 1897.

49	114
51	24
49	114
109	419
109	434
d109	839
d109	845
49	114
112	1018

The opinion of the court was delivered by

BREAUX, J. From the refusal of the court *a qua* to grant the injunction applied for in this case, plaintiffs, residents of the city, owners of property therein, and taxpayers, prosecute this appeal.

The plaintiffs assert that Act 70 of 1896 is unconstitutional and void.

Whether the Legislature can pass a valid act to establish a commission for the port of New Orleans, define their powers and duties, provide a revenue therefor, is the question before us.

The first ground of nullity urged is that the act creates a corporation, and is in consequence obnoxious to Art. 48, prohibiting the General Assembly from passing any local or special law creating corporations.

Some question also has been made regarding the power of the Governor to appoint the members of the board.

It is in point to state that it is declared in the preamble of the act that public notice has been given as required by Art. 48 of the Constitution. It also contains the declaration, which we paraphrase as follows for the sake of brevity: The port of New Orleans has been gradually extended beyond the corporate limits; the divided authority of three parishes and consequent fees, injuriously affect the traffic of the port and threaten to divert the trade to other ports; the supervision and control of a board will consolidate the service of harbor-master and wardens, wharf superintendents, wharfingers of three parishes under one body at a reduced expense.

The controlling motive is, it is further stated, to operate and improve the wharves, develop and expand the commerce of the port on the lines above indicated.

Act 70 of 1896, under which a Board of Commissioners was appointed, does not create a corporation.

We think that the Legislature may, without contravening the article of the Constitution ordaining that the General Assembly shall not pass any local or special law creating corporations, provide for the appointment of a Board of Commissioners, with powers and duties set forth and defined in the act under consideration. The "Board of Commissioners" authorized by the act of 1896 is not a body corporate within the meaning of the Constitution. It is obvious that the Legislature did not intend to create a corporation. Generally, a corporation has succession in its corporate name; it may plead and be impleaded; it may hold and convey property.

The board here is not invested with all these qualities, essentials to the existence of a corporation.

The act empowers this board to administer the public wharves of the port and invests it with certain duties. The matter is, we think, one chiefly of administration. The Legislature had the power to pass an act to administer the affairs of the public wharves and levees through agents.

Having this power it had the power to carry the legislative will into execution through the intervention of a Board of Commissioners appointed for the purpose, without necessarily creating a corporation within the inhibitory clause of the Constitution. Though the board may possess some of the incidents of a corporation, it is not necessarily a corporation.

The provisions of the act can only be regarded as regulations and agencies to be enforced by this board. It is given such authority as may be needful to that end. The members are agents acting together.

This board is not a body corporate with privileges and immunities such as public corporations must have. The most that can be alleged is that the act authorizes the board to perform certain designated acts, which we must assume are in the interest and for the welfare of the State. The general modes of creating corporations are not before us for consideration. We are only concerned with an act of public agency passed for a special purpose. As such we do not think that it should be adjudged a public corporation.

Conceding that the constitutionality of the act is not as clear as it might have been made to appear, the authorities hold that every possible presumption and intendment will be made in favor of the constitutionality of an act, and that the courts will only interfere in cases of clear and unquestioned violation of the fundamental law. It has been repeatedly said that the presumption is that every State statute, the object and provision of which are among the acknowledged powers of legislation, is valid and constitutional; and such presumption is not to be overcome unless the contrary is clearly demonstrated.

Sedgwick on the Construction of Statutory and Constitutional Law, p. 409.

INTERPRETATION ALMOST CONTEMPORANEOUS WITH THE CONSTITUTION.

It is agreed by all the books that to contemporaneous interpretation due weight should be given in cases of ambiguity and uncertainty. A number of acts have been passed creating similar boards in this State, under which commissioners have been appointed by the executive. In matters of public health, in administering the affairs of canals and other interests in which the State is concerned, boards are appointed with the silent acquiescence of the people, including the legal profession and the judiciary.

Great deference, said the Supreme Court of New York, is certainly due to legislative exposition of a constitutional provision, especially when it is made almost contemporaneous with such provision, and might be supposed to result from the same policy and mode of reasoning which prevailed among the framers of the instrument propounded in convention assembled. *People vs. Green*, 2 Wend. 266, 274.

The maxim itself is, *Contemporanea exposito est fortissime in lege*.

APPOINTMENT OF THE BOARD OF COMMISSIONERS.

The second point, relating to the appointment of the officers who should be charged with the administration of the wharves and revenues, is more particularly taken by the city of New Orleans.

The city avers that the matters involved are local and municipal, and that under Art. 253 of the Constitution the officers charged with such duties must hold their offices from the people in the city.

It is not alleged that the city, through any of its officers, can enforce the act. This is impossible under the law. It must be enforced, in so far as relates to the selection of the members of the board in accordance with its provisions, or it can not be enforced at all.

Article 253 is in these words:

"The citizens of the city of New Orleans, or any political corporation which may be created within its limits, shall have the right of appointing the several public officers necessary for the *administration of the police* of said city, pursuant to the mode of election which shall be provided by the General Assembly." (*Italics ours.*)

The organic law, in terms, secures "the right (to the city)

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of appointing the several public officers necessary to the administration of the police," while the Board of Commissioners have the power of "providing for lighting and policing the wharves and sheds." They are not necessarily conflicting duties. One power is not necessarily opposed to the other. One may provide funds and the other may have charge of the police of the wharves.

The act in question, as relates to the appointment of the members of the Board of Commissioners, is not unconstitutional.

The story of the wharves is gracefully narrated in the brief. Counsel, in support of their cause, quote from well considered decisions of our predecessors. First *Municipality vs. Pease*, 2 An. 542; *Louisiana State Bank vs. Orleans Navigation Company*, 3 An. 295; *Stewart vs. City of New Orleans*, 9 An. 461.

It is also supported by reference to the utterances of prominent legislators in the past history of the State, whose learning and ability were conspicuous in directing the course of legislation and safeguarding public interest. The gist of the narration is that since the days of Governor O'Reilly, under Spanish dominion, ordinances have been enacted by the city relative to fees for wharfage, and that the city always had complete and absolute charge of the police.

It is possible that the historic argument loses its immediate point, in view of the fact that private rights, in so far as appears in this case, are not to be interfered with, and that the police is to remain under the direction of the city authorities.

We refer to one of the cited authorities in counsel's brief, and one upon which, we infer, they confidently rely. In the case cited, that is in *Edgerton vs. New Orleans*, 1 An. 437, Mr. Justice Rost, speaking for the court, said in substance: That the city had special sovereign power; it had the right to appoint the several police officers necessary for the administration of the police. A right which we also hold can not be questioned.

This right, the court in the last cited case justly said, is secured and rendered permanent by Art. 128 of the Constitution.

And further the court says: "The counsel derides the idea that the city is invested with sovereign powers. Names can not alter things. Under our policy no department of the government exercises the power of sovereignty in its own right. *The constitutional powers of the State are all trust. The powers of the Legislature, of the court and of the city of New Orleans differ in degree and object, but*

they all derive their binding force from the supreme law of the State."
(Italics are ours.)

Article 253 of the Constitution of 1879 is substantially a reproduction of articles upon the subject of preceding constitutions, save that the wording in the latter in regard to the police of the city is slightly different. We reaffirm the decision.

constitutional limitations alone are the measure of legislative power.

The legislative powers legitimately to be implied from the terms of the decision just cited are broad enough to sustain our views.

THE BANKS OF RIVERS ARE FOR THE USE OF THE GENERAL PUBLIC.

The powers of a municipal corporation are divided into public and private. In all that relates to purely municipal purposes, appointments or election can only be made by municipal authority.

"The powers and capacities," said Judge Cooley, as organ of the court, "which are acquired under them, are usually spoken of as private, in contradistinction to those in which the State is concerned, and which are called public." *People vs. Detroit*, 28 Mich. 228.

Landings within the limits of corporations are not without legislation, within the power of the municipal government. The State is concerned; while it may delegate its authority, on the other hand it may exercise it through its chosen agents. The State may appoint agents to take charge of any of the public property not by the Constitution confided to any other authority. *Maximillien vs. Mayor*, 62 N. Y. 160; *Connors vs. Mayor*, 2 Hun. 440; *Kuhn vs. Latro*, 46 Pacific, 87-94; *Easterly vs. Incorporated Town of Irwin*, *Northwestern Reporter*, 919-921.

We now reach the next point: That the act is obnoxious to Art. 46 because it provides for the maintenance of the wharves and landings and approaches thereto, which are, counsel urge, public highways. The constitutional prohibition applies to "roads," "highways," "streets," or "alleys," and does not embrace landings and levees. They are *loci publici*, and are, at times, referred to as public places on which there may be "highways." The words of a law are to be understood in the common and usual signification. "Highway," as generally understood, and in the sense in which it is employed in the Constitution, between the related words of "street" and "road," does not include rivers or its bank. The rule *nosciatur a sociis* is not without application.

Duffy et al. vs. City et al.

THE STATUTE IS NOT LOCAL NOR SPECIAL.

We are not impressed by the argument that the act is a local or special law. We would find difficulty in acceding to the proposition that the act is local and special. There are no issues involved of small or local consideration. The fertile valley is interested; the traffic and commerce on seas and ocean are concerned.

The act under which the Criminal District Court of this city was given life and authority was assailed as being a local law, contrary to the article of the Constitution here invoked. This court decided that it was not a "local law," but general in its effect, citing a number of authorities in support of the opinion (State vs. Dolan, 35 An. 1141, 1144).

That act was much less general in its effect than the law we now have under consideration. The law being general in its effect, it is general (30 Howard B. C. New York, 289).

A QUESTION OF ADMINISTRATION ONLY.

We pass to the alleged repugnance of the act to Art. 56 of the Constitution.

It is urged upon our attention by counsel that the intent of this article is to prevent the possibility of wrongfully divesting municipal corporations of their private property.

The matter we are called to decide is purely administrative. There is nothing granted to the Board of Commissioners save the right to administer, in accordance with the terms of the act, property of which the State has the power to resume control.

The fact that this board may attempt to exceed its powers is no reason, in the present proceeding, for declaring the act void.

DUE PROCESS OF LAW.

This brings us to the consideration of the alleged attempt to deprive the city of her property, without due process of law, and without compensation.

The grantor of the franchise is a public body; the grantee also. It is settled by numerous decisions that in such a case the grant is not beyond the reach of the legislative power. The State can, on suitable occasions, acquire the power with which it has parted without the necessity of resorting to the courts. It is certain that the city

can expect no compensation in the literal meaning of that word for public property. It is with that class of property we are now dealing. If the city has private interests involved, they must be protected.

Under an allegation of private interests, however, we do not think it possible to prevent the enforcement of a law, under which the control of public property is resumed.

THE PURCHASE OR EXPROPRIATION OF A FRANCHISE.

Lastly, it is urged, that the proposed purchase or expropriation of the lease of the Louisiana Construction Company, at the expense of the city, is another illegal feature of the act.

By the terms of the act, the State has made it the duty of the Board of Commissioners as its agent, to acquire the lease of the wharves, by purchase or by expropriation; *i. e.*, the lease now held by the Louisiana Construction and Improvement Company, and it is also made the duty of the Common Council to provide for the payment of the price of the purchase or expropriation; provided, that this price to be paid shall be satisfactory to the council.

First—As to the authority of the Board of Commissioners, it is not evident that the Legislature has exceeded its authority. Leases generally are as subservient as any other contract to the power of eminent domain, upon condition of adequate compensation. In reference to a franchise, it has been decided that it is “of no higher order and confers no more sacred title than a grant of land to an individual, and where the public necessities require it, the one as well as the other may be taken for public purposes on making suitable compensation.” Abbott’s National Digest, Vol. 2. A lease of a franchise must be held subject to the same principle, or else the power of eminent domain might be easily frustrated. We do not intend to intimate that there was any such purpose in this case in leasing the franchise. We only hold, that leases generally are held subject to the power provided for by the article of the Constitution, reading:

“No *ex post facto* law, nor any law impairing the obligations of contract, shall be passed, nor vested rights be divested, unless for purposes of public utility and for adequate compensation.”

Second—As to compelling the city to pay the price as contended by plaintiff, is the purpose. Such is not our interpretation of the

Deniger vs. Excavating Co.

act. The power, as we believe, was intended to be directory. The City Council is not commanded, *nolens volens*, to provide the funds and pay the price. The proviso which reads "that the price to be paid shall be satisfactory to the said council" invests the whole section with a permissive character in so far as the City Council is concerned.

In re Brooklyn, published in "Lawyer's Reports of Annotated Cases," Book 26, pp. 270, 278.

As to the lease under which the wharves are now held and managed by the Louisiana Construction and Improvement Company, we express no direct opinion; there may be special defences taking it out of the grasp of general principles. It will be time enough to pass on particular questions if the matter should be brought before us, in course of time contradictorily with those directly concerned.

The issues actually before us would not justify an injunction.

The judgment is affirmed.

No. 12,295.

WILLIAM A. DENIGER VS. SIXTH DISTRICT SANITARY EXCAVATING COMPANY.

APPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Henry P. Dart and Benjamin W. Kernan for Plaintiff, Appellee.

Charles F. Claiborne for Defendant, Appellant.

Argued and submitted December 18, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal from the judgment decreeing plaintiff to be the owner of twenty-five shares of the stock of the Sixth District Excavating Company and the dividends thereon. The judg-

ment is against the company and the defendant Benton, who has collected the dividends in controversy.

The issue is one of fact only and the judgment of the lower court is affirmed.

No. 12,211.

NEW ORLEANS CANAL AND BANKING COMPANY VS. LEEDS & Co.,
LIMITED.

49	123
52	281
49	123
125	852

The movables permanently attached to a factory, if the factory is an immovable property, are also immovable, and as such, subject to a mortgage bearing upon the whole factory.

One who has no interest in a fund has no right to interfere in its distribution.

A debtor unless he alleges and shows that he has an interest of some sort involved is without right or authority to raise the question of the illegality of the transfer of the claim for which he is sued.

The books of a corporation are admissible in evidence to prove the claim of a creditor, as against other creditors, if it is shown that they are correctly kept, and all the circumstances support the entries as to their verity.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Branch K. Miller for Plaintiff, Appellee.

Hugh C. Cage and *Benjamin Rice Forman* for Receivers and others,
Third Opponents, Appellants.

Carroll & Carroll for Mrs. Charles J. Leeds Defendant in Third
Opposition, Appellant.

Argued and submitted November 18, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 18, 1897.

The opinion of the court was delivered by
BREAUX, J. This is an action *via executiva*, to enforce the payment of three notes secured by mortgage.

The property mortgaged is the "Leeds Foundry," and is described

as consisting of parcels of ground, in the First District of this city, with the buildings and improvements. The evidence discloses that the machinery, consisting of boilers, engines, lathes and other implements, which the third opponents claim are not mortgaged, were placed by the owners for the improvement and service of the foundry, before the date of plaintiff's mortgage.

The liquidators of the insolvent firm of "Leeds & Co., Limited," mortgagors, in their petition of intervention and third opposition, allege that plaintiff owns only one of the three notes, and that the other two notes are owned by Mrs. Charles J. Leeds. That included in the property seized are tools and other implements not affected by the mortgage.

They pray for separate appraisal and the amount of the sale of this property be distributed among the ordinary creditors.

They allege further that she is not a creditor of the corporation of Leeds & Co., Limited. That the latter had no authority to mortgage its property to her or to give her any interest in the notes secured by the mortgage, for which it received no consideration.

The plaintiff and Mrs. Leeds, in separate answers, in substance, denied the averments of the third opponents.

1. The judgment of the District Court maintained the opposition in so far as to limit the interest of the plaintiff, subrogee, in the claim sued on, to one note of five thousand dollars, with interest, and limited the interest of Mrs. C. J. Leeds in the other two notes of the three notes sued on to six thousand three hundred and sixty-nine 55-100 dollars with interest, and added an order in regard to fees and costs.

With these exceptions stated in the judgment, the oppositions of Henry Rennyson and John P. Baldwin, liquidators and receivers, were dismissed.

From this judgment the opponents have appealed.

Mrs. Leeds also prosecutes an appeal.

The first question which this case presents is whether the "movables" were part of the foundry and immovable by destination, and as such, subject to plaintiff's mortgage.

The tools, lathes and machines, forming part of a foundry, and used in its works, become immovable by destination. These improvements in the Leeds foundry, in so far as it was needful to the operation of the foundry, were permanently attached to the realty, and

rested upon brick and mortar. At the time the Civil Code was adopted, interests in manufacturing industries were quite limited. The article of the Civil Code, 458, is, in consequence, not as large and full upon that point as it is in regard to agricultural immovableness. At this time, the conditions of the two do not greatly differ. The movables permanently attached to factories, if the factory itself is immovable, become an immovable by destination, in the same manner that things which the owner of a tract of land has placed upon it for its service and improvement are immovable by destination. C. C. 468.

Applying this rule we think that the "movables" were subject to plaintiff's mortgage.

Williams vs. Sheriff, 47 An. 1286; *Baldwin vs. Sheriff* 47 An. 1468; *Maginnis vs. Oil Company*, 47 An. 1496; *Citizens Bank vs. Knapp*, 22 An. 117; *Theurer vs. Haute*, 23 An. 749; *Folger vs. Kenner*, 24 An. 436.

This brings us to the second question involved in the case, that is, whether after imputing the proceeds of the sale to the payment of the mortgage preceding in rank the mortgage claimed by one of the appellants, *Mrs. Leeds*, there remains anything to be imputed to the payment of the claim of any one.

It is undisputed, plaintiff held two prior mortgages in addition to the amount of its claim in these foreclosure proceedings. The adjudicatee of the property retained in his hands an amount of a mortgage also undisputed, *i. e.*, the mortgage mentioned for identification as the *Butler mortgage*. It appears by the sheriff's return, admitted in evidence without objection, that there will remain after payment of these mortgages only a small amount which would be imputable to the payment of the creditors subsequent to plaintiff in rank of claim, were it not that there are one or more balances unsatisfied under the terms of the prior mortgages, so that be the final result of the litigation what it may, opponents and other creditors will not recover, and are absolutely without any interest.

It will be observed that the prior claims are not contested. The objection is directed against *Mrs. Leeds'* claims as alleged holder of the notes secured by mortgage. She is not to collect anything.

This court has decided where one had no right in the fund distributed he can not contest its distribution. *Tiner and Conrey vs. Steamer Bride*, 5 An. 756.

It follows as a conclusion that those who dispute the claim of an alleged creditor are without interest to have the illegality determined if it be manifest that the alleged creditor can not possibly have any interest in the fund held to be distributed.

To sustain a third opposition against an alleged creditor the intervenor must allege and prove that he has an interest involved in the suit as against the particular alleged creditor whose claim he contests. *Coleman vs. Coleman*, 37 An. 586.

In addition, the want of interest is apparent in so far as relates to the debtor's right to contest.

The debtor is the corporation of Leeds & Co., Limited.

It received credit of an amount ostensibly, at least, advanced by the wife of one of the incorporators. The receivers represent the firm and must here be held, on this point, to the rule which would apply to the firm. We have not found a word of testimony proving that Charles J. Leeds, the husband, is indebted to the firm. In the absence of such proof, it can not be a matter of much concern, either to the corporation or to the liquidators who is the creditor. It, or they have no interest in the result, and can not sustain objections that can not be of any one avail save to interested persons; particularly as fraud is not alleged or intimated.

We pass to the last point in the case; our views heretofore expressed render it unnecessary to dwell, at any length, upon the issues it presents.

First, the entry in the books of Leeds & Co. were offered in evidence by Mistress Leeds.

To which evidence the third opponent objected on the ground that the books of an insolvent corporation can not be used in evidence as against other creditors.

In argument at the bar, the case of *Calder vs. His creditors*, 47 An. 1539, was cited in support of the objection. The conditions are not the same.

In the cited case the witnesses had no knowledge that qualified them to satisfactorily prove the indebtedness; the case was remanded for further proof.

In the present case there was nothing suspicious in the appearance of the books; the manner they were kept and the entries as made, besides they were supported by ample corroborative proof.

Finally, *ex industria* we have examined the only remaining ques-

State vs. White et als.

tion. In our view it is not actually before us for decision. We agree with the District Judge that it appears of record that she had the amount which she subsequently delivered to her husband; that it was invested by him in his business; that notes were made by him secured by mortgage for her security; that these notes were actually deposited as such security with plaintiff's bank; that at a time subsequent, at the instance of plaintiff through its president, these notes were surrendered by her and delivered to plaintiff bank in order to enable the corporation of Leeds & Co. to obtain a loan which it used for the purpose of its business; that in lieu of the surrendered security to the bank, the notes secured by mortgage of Leeds & Co. were held as her security.

These being the facts, we think the judgment should be affirmed. It is affirmed.

No. 12,266.

THE STATE VS. ELECK WHITE ET ALS.

A legislative act amending the section of the Revised Statutes defining the crime and providing for its punishment, which merely changes the *maximum* of the penalty, repealing the section only so far as it conflicts with the amendment operates no repeal of the section except in respect to the *maximum* punishment for offences committed subsequent to the act; hence, the power to try and sentence under the section for an offence prior to the amendatory act is not, touched by it. Revised Statutes, Sec. 792, Act No. 59 of 1896.

The decision distinguishes legislative acts dealing with the subject of a prior law, and which repeals all laws on the same subject matter, and a legislative act merely amendatory of the prior law and repealing it only so far as is inconsistent with the amendment. 18 An. 485; 12 An. 431.

APPPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. Caillouet, J.

M. J. Cunningham, Attorney General, and L. C. Moise, District Attorney (P. A. Simmons, Jr., of Counsel), for Plaintiff, Appellant.

Beattie & Beattie for Defendant, Appellee.

Submitted on briefs November 7, 1896.

Opinion handed down November 30, 1896.

Rehearing refused January 4, 1897.

49	127
50	689
49	127
109	239
49	127
120	542

The opinion of the court was delivered by

MILLER, J. The defendant, convicted of shooting with intent to murder, moved in arrest of judgment, on the ground that Sec. 792 of the Revised Statutes, under which he was indicted, had been repealed by the Act of the Legislature, No. 59 of 1896. The motion in arrest of judgment was sustained, and the State appeals.

The Act of 1896 repeats the language of Sec. 792 in defining the offence of assault with intent to murder, but while the section limits the punishment to two years, the Act of 1896 fixes the *maximum* imprisonment at twenty years. With this difference, the section and the act are the same constituting the offence. The act is entitled "An Act to Amend and Re-enact Sec. 792 of the Revised Statutes," and the repealing clause of the act repeals only laws or parts of laws in conflict with it.

It is familiar that the repeal, pending the prosecution, of the statute on which the conviction is obtained divests all jurisdiction to sentence. Judge Martin's reason for this conclusion was that the repeal of the statute in such case carried the presumption of a pardon. *State vs. Johnson*, 12 La. 552. Where the statute is completely effaced by legislation, contemplating and effecting that purpose, it is to be accepted as manifesting the legislative will that the offence denounced by the previous statute shall no longer be deemed a crime. Can it be supposed in this case that the Legislature, by amending and increasing the punishment of assault with intent to murder, intended thereafter that an assault of that character should not be punished at all? If the key to the interpretation of statutes is the intention that prompted the legislation, it must seem difficult to attribute to this Act of 1896 the construction affirmed in the motion of arrest.

When the Legislature, dealing with an offence under a pre-existing statute, has defined the offence in terms the same, or with additions or qualifications not in the original act, the later legislation repealing all laws on the same subject matter, it has been held that the previous statute is completely repealed, and there is no power to sentence under the conviction for an offence committed before the later legislation. *State vs. Clay*, 12 An. 481; *State vs. O'Conner*, 13 An. 486. The legislation, in part, at least, the subject of these decisions, was revisory. In other decisions, in respect to legislation of this character, it was held that no purpose to disturb prior legisla-

tion could be predicated on the mere transfer of the provisions of the previous statute into the codification designed only to exhibit the entire statute law, although the codification contained the repealing clause or all laws on the same subject matter. It was only when the codifier had omitted some part of the old statute, that a repeal was to be admitted, and then only as to the omitted provision. On the same line, however, new legislation on the same subject, essentially different from that in the previous legislation, would affect a repeal. *Holmes vs. Wiltz*, 11 An. 439; *State vs. Brewer*, 22 An. 273. It is perfectly manifest that this Act, No. 59 of 1896, is revisory in its character, for the purpose of changing the maximum punishment for assault with intent to commit felonies. Under the revised statutes that maximum was two years. The legislative judgment evinced by the Act of 1896 was that the maximum for so serious a crime should be increased to twenty years, the act so declares, and that is the only change. Consistently with the decision as to revisory legislation, it would seem difficult to maintain that this act of 1896, repealing the Sec. 792 of the Revised Statutes, changing only the maximum of punishment, repealed all laws to punish murderous assault. Then, too, where, as in the cases cited, repeals have been inferred, there has been a complete obliteration of the earlier by the later statute—that is, a repeal of all laws on the same subject matter. In such cases the conclusion of the repeal of the previous statute is constrained by the force of the sweeping repeal. No such repeal could well rest on the presumption of the legislator to release the offender from prosecution under a pending indictment. Re-enacting the statute defining and punishing the crime certainly does not convey the significance that the legislative intent was there should be neither crime or punishment. Our courts have gone far enough it would seem in some of the cases cited implying repeals. We do not feel at liberty to hold in this case that all law to punish offenders in custody at the date of the act, has been swept from the statute books merely because the Legislature has seen fit to increase the punishment for the crime. The act of 1896 does not repeal all laws on the same subject matter, but only laws in conflict with it. The act of 1896, in our view, keeps in force Sec. 792 in all its parts, save that as to offences committed after the act; the sentence may be kept up to the *maximum* of twenty years.

Vance vs. Bank.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, sustaining the motion to quash, be and it is hereby set aside and annulled, and that the court proceed to sentence the accused.

No. 12,180.

S. W. VANCE VS. FIRST NATIONAL BANK OF SHREVEPORT.

Interest in excess of legal interest was deducted from an account though closed. Other items charged in error were deducted.

Values, held as collateral security, transferred to third persons by the creditor, it was held, should be returned, or their value deducted from the amount of the creditor's claim.

A PPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

Leonard & Randolph and F. G. Thatcher for Plaintiff, Appellee.

Wise & Herndon for Defendant, Appellant.

Argued and submitted June 5, 1896.

Opinion handed down June 20, 1896.

Rehearing refused January 4, 1897.

STATEMENT OF THE CASE.

The defendant brought suit to foreclose a mortgage.

The plaintiff obtained an injunction on the ground that he was not indebted to defendant's transferee.

The notes secured by the mortgage were past due on the day of transfer to the defendant. They are subject to the equities the plaintiff might have pleaded against the original holder.

The mortgage by the defendant was executed in favor of a merchant who had made advances to the plaintiff. He also transferred a second note, secured by mortgage on other property, and a deed of trust to lands in Arkansas, as collateral security. The merchant, holder of these values, transferred them to his creditors.

State vs. Chiqui

The merchant transferred to the defendant, as collateral security, the mortgage and notes identified with the act of mortgage. In the account interest had been computed at twelve per cent.; besides the merchant had, in error, charged the plaintiff with items of indebtedness he did not owe. The accounts between the plaintiff and the merchant had been acknowledged by the former.

The mortgage was executed with the view of obtaining advances, and the parties did not transact with any special intention of securing the amount.

The court reduced the interest from twelve per cent. to five per cent., although the plaintiff had a number of times, at different dates, acknowledged that the account rendered to him was correct.

The items erroneously charged were deducted from the account, and, consequently, from the amount of the mortgage, which had been executed in favor of the merchant, the original transferrer to the defendant.

With reference to the collateral deposited by the plaintiff with the merchant, and by the merchant transferred to third persons, the court held that their value should be fixed and credit given to the plaintiff of the amount of this value.

To the merchant or his transferee the defendant was reserved the right of surrendering the notes and deed of trust, and upon that surrender, they, or either, to be relieved from the necessity of having the claim reduced on account of the notes and deed of trust outstanding.

If, on the other hand, the defendant or the merchant did not produce and surrender the notes and deed of trust, then, in that case, the value was to be ascertained and the defendant or the merchant was to be charged with the value so ascertained.

The injunction was dissolved and a decree rendered in accordance with the court's opinion.

No. 12,288.

STATE OF LOUISIANA VS. FULGENCE CHIQUI.

There are no Indians in Louisiana under the protection of the Federal Government, living on reservations set apart for them by that government, maintaining tribal relations. The State courts therefore have jurisdiction over them for offences committed by them.

State vs. Chiqui.

A PPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *E. N. Cullom, Jr., J.*

M. J. Cunningham, Attorney General; *Phanor Breazeale*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellant

L. J. Ducoté for Defendant, Appellee.

Submitted on briefs November 21, 1896.

Opinion handed down December 14, 1896, affirming the decision of lower court; a rehearing was applied for and granted, and the opinion on rehearing handed down January 4, 1897.

The opinion of the court on rehearing was delivered by

McENERY, J. When this case was submitted there was an agreed statement of facts, upon which the opinion and decree were based.

The case went off on the admission that the Tunica Indians were on a reservation set apart for them by the Federal Government, maintained tribal relations, etc. This was a statement of an historical fact that had no foundation for its assertion.

The following correspondence shows that the Federal Government has not set aside any reservation for Indians in Louisiana, and has no Indians under its protection in the State:

"DEPARTMENT OF THE INTERIOR,

"OFFICE OF INDIAN AFFAIRS, WASHINGTON, December 9, 1896. }

"The Honorable the Secretary of the Interior:

"SIR—I have the honor to acknowledge the receipt, by your reference for consideration and report, of a letter from Judge S. D. McEnery, of New Orleans, dated December 23, 1896, requesting information concerning the relations of the Tunica Indians with the Federal Government, it being claimed that the remnant of this tribe is now located on a reservation situated in the parish of Avoyelles, set apart for them by the Federal Government.

"In reply, I have the honor to report that this office does not have any knowledge of any land in Louisiana set apart for Tunica or any other Indians for an Indian reservation.

Joubert vs. Sampson.

"There was presented to Congress on the 19th of February, 1806, a report of Lewis and Clark of their expedition to explore the Missouri river and to enter into conference with the Indian nations on their route, etc., etc. With this report was submitted 'Historical sketches of the several Indian tribes in Louisiana south of the Arkansas river, and between the Mississippi and river Grande,' by John Sibley to the Secretary of War. This reference is made relative to said Indians:

"*Tunicas*.—These people formerly lived on the Bayou Tunica, above Pointe Coupee, on the Mississippi, east side; live now at Avoyelles; do not at present exceed twenty-five men. Their native language is peculiar to themselves, but speak Mobillian; are employed occasionally by the inhabitants as boatmen, etc.; in amity with all other people, and gradually diminishing in numbers.'

"See American State Papers, Indian Affairs, Vol. 1, p. 725.

"The Federal Government does not have jurisdiction over any Indians in Louisiana. If they have a reservation of land, it must have been granted or reserved to them by the State of Louisiana.

"The letter of Judge McEnery is herewith returned.

"Very respectfully, your obedient servant,

"D. M. BROWNING, *Commissioner*."

It is therefore ordered that the decree heretofore rendered in this case be annulled, and it is now ordered and decreed that the judgment appealed from be annulled, avoided and reversed, and that the case be remanded to be proceeded with in due course of law.

No. 12,293.

49 133
114 144

LEON JOUBERT VS. MRS. SUSAN A. SAMPSON, THOMAS H. SAMPSON,
INTERVENOR.

When an appellee exercises the privilege of filing a plea of prescription the party against whom it is opposed has the privilege of demanding that the cause shall be remanded for the trial of that plea.

This court is without discretion to refuse such application if made prior to the submission of the cause.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Joubert vs. Sampson.

A. J. Villeré for Plaintiff, Appellee.

W. S. Benedict for Intervenor and Third Opponent.

Argued and submitted December 17, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

WATKINS, J. This is an executory proceeding to foreclose a special mortgage on real property of defendant, which was consented on the 12th of October, 1891, and Thomas H. Sampson intervened and claimed a large portion of the proceeds of sale under an alleged prior and ranking mortgage on the property.

The following extracts from the brief of the intervenor fully state his claims, viz.:

"The case came on for trial on the 18th of June, 1896, and note of evidence was taken. On behalf of plaintiff in intervention there was introduced an act passed before A. Pitot, notary, on the 24th of January, 1896, in which a release was granted of stock mortgages and claims for taxes paid, due to the Citizens Bank of Louisiana, and recognition in that act of the receipt of the same was had.

"On the same day, the 24th of January, 1885, before the same notary, Pitot, there appeared the then two living heirs of W. R. Crane, who made an act of acknowledgment in favor of the intervenor, Thomas H. Sampson, of the receipt of the funds wherewith to pay the said Citizens Bank stock mortgages and taxes due to date, from him, the said Thomas H. Sampson, and their recognition of his rights arising therefrom, and in which they declared that they obligated themselves in the event of the death of their mother, then the wife by second marriage of Thomas H. Sampson, to make no claim to the above described property as forced heirs of their mother until the amount paid by the said Thomas H. Sampson, out of his own personal funds and estate, as aforesaid, to free and release said property from the aforesaid taxes and privileges, shall have been duly paid and refunded to the said Thomas H. Sampson.

"The question before the court, as presented on the intervention of Thomas H. Sampson, is, that under Art. 2160 of the Civil Code,

Joubert vs. Sampson.

his advance to the Citizens Bank for its mortgages and taxes, and payment of other taxes, in a sum equivalent to ten thousand dollars, subrogated him to those rights, and that the same was made known to each and every party in interest, by the recordation in the conveyance office of the act of the 24th of January, 1885, in book 119, folio 952, on the 20th of February, 1885."

Again:

"That it was apparent upon the face of the record of the Succession of William R. Crane and his will, and his acquisition of the property in contest, as well as of the act of acknowledgment in favor of Thomas H. Sampson, that Mrs. Susan A. Crane did not, by law, take under the will more than the law permitted her to have in and to the real estate owned by her deceased husband prior to his marriage to her. The forced heirship of three children surviving him, one of whom subsequently died without issue, and whose interest was inherited by the remaining two as well as the mother, showing upon the face of the record that at the time Leon Joubert, the mortgage creditor, loaned his money on the faith of that property, that the interests therein of Mrs. Susan A. Crane were not for an entire but only partial ownership, and hence that he can not take by his mortgage more than the law permits under the facts aforesaid; that is, the sale, if ordered to be made, to be restricted to one undivided half interest of Mrs. Crane in and to the property described, and that subject to one-half of the sum of ten thousand dollars so paid, with legal subrogation, by Intervenor Sampson, on the 24th of January, 1885."

This statement of the intervenor's counsel amounts to this, that his case stands in the attitude of *Newman vs. Cooper*, 46 An. 1485. That William R. Crane, deceased, was, at the time of his death and before, indebted to the Citizens Bank, and that indebtedness was secured by a mortgage on the property in suit. That, at the request of two of his heirs, the intervenor paid the debt of their father and became legally subrogated to the rights and mortgage of the bank. That Mrs. Susan A. Crane, surviving widow, had neither the power or authority to mortgage the property to a greater extent than her undivided half interest.

On the trial of these issues there was a judgment in favor of the plaintiff in executory proceedings and against the intervenor, rejecting his demands, and the latter has appealed.

Bank vs. David et al.

In this court plaintiff in executory proceedings filed a plea of prescription of five years, whereby he claims that the intervenor's demand is cut off and barred; thereupon counsel for the intervenor moved this court to remand the case to the lower court for the purpose of taking testimony, and having that question determined contradictorily therein.

The provision of the Code of Practice is, that "prescription may be pleaded before the Supreme Court when the proof of it appears on the face of the proceeding in the lower court. But the party to whom it is opposed shall have the privilege of demanding that the cause be remanded for trial on that plea." Art. 902.

On the face of that article this court is without discretion in the matter.

It is therefore ordered and decreed that this cause be remanded to the court *a qua* for the sole purpose of trying the plea of prescription—this appeal, in other respects, remaining in *statu quo*.

No. 12,279.

PEOPLE'S BANK OF NEW ORLEANS VS. GEORGE P. P. DAVID ET AL.

The heir who purchases at the sale, to effect the partition to complete his title, must pay the surplus of the price over the portion coming to him when the amount due by him is fixed by the partition. Civil Code, Art. 1843.

When such heir mortgages the property, the *proces verbal* of adjudication or act of sale to him showing non-payment of the price, the mortgagee will be deemed apprised that the title of the co-heirs entitled to the payment of the price so that they may get their shares, is not divested, and the mortgage will be treated as operative only to the extent of the mortgagor's ownership of the property as heirs, not enlarged by the incomplete partition.

The court distinguishes this case from the line of decisions that uphold mortgages acquired in good faith upon the faith of complete titles spread on the records. 1 An. 208; 4 An. 84; 45 An. 1085; 48 An. 1160.

Nicholls, C. J., and Breaux, J., concur in decree.

APPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

E. Howard McCaleb for Plaintiff, Appellant.

49	136
49	344
49	138
104	480
49	136
109	121
49	136
110	37
111	456
49	136
112	654
114	145
49	136
116	9
49	136
123	156

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Merrick & Merrick and Gus. A. Breaux for Louis Leon, Tutor of Agnelly Minors, Appellees and Appellants, praying for nullity, etc.

Argued and submitted December 3, 1896.

Opinion handed down January 4, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal by the plaintiff from the judgment sustaining the intervention of the minor heirs of Joseph David, claiming to be paid their shares out of property of the succession alleged to have been acquired in the partition proceedings by the major heirs of the deceased, afterward mortgaged by them to the plaintiff, the proceeds in controversy being derived from the sheriff's sale under plaintiff's writ of seizure and sale.

The deceased, Joseph David, left several major heirs, one minor child and the children of his predeceased daughter, these grandchildren, represented by their tutor, being the intervenors. Shortly after the death of the deceased partition proceedings were instituted, the partition was decreed, and there was the usual reference of the parties to the notary. Under the advice of the family meetings, the private sale of portions of the property was authorized, and the residue, mainly real estate in this city, was sold at auction, the major heirs becoming the adjudicatees. No portion of the price was paid, each act of sale reciting the price was to be accounted for in the partition proceedings. The subsequent proceedings before the notary were the settlement of the accounts, the formation of the active mass, the deductions to be made and the ascertainment of the distributive shares of the heirs, that of the intervenors being fixed at sixteen thousand and forty-five dollars. No cash was paid by the purchasing heirs, and hence none was distributed in the partition proceedings, but the statement is made by the notary that the liability of the heirs by agreement is to be settled "outside the partition." By the terms of the partition the major heirs were treated as owing the amount of the adjudication, or so much as was requisite to pay the shares of the minor heirs. The partition was homologated. Subsequently, the major heirs, who had purchased but never paid the amounts of the adjudications, mortgaged the property to the plain-

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tiff, and under the bank's writs, as already stated, the property was sold and the proceeds realized.

The intervention of the minors alleges in substance the invalidity of the partition proceedings, because the major heirs never having paid the price, there was no distribution or completion of the proceedings; hence the title of the minors in the succession property was never divested; that the plaintiff had knowledge of the defect in the proceedings, that its mortgages are void as respect the minors and the prayer is that the minors be decreed entitled to receive their distributive shares from the proceeds. The plaintiff excepted to the intervention on various grounds not discussed here, and the exceptions overruled, answered in substance, setting up the partition proceedings, averred that the assets, so far as they consisted in open accounts and bills receivable, purchased by the major heirs at the partition sale, were not collected; that the entire property of the succession was not more than sufficient to pay the debts; that all the heirs guaranteed, minors included, the debts due the succession and bills receivable; that the major heirs have paid all the succession debts and have paid the minors all due to them. The judgment of the lower court maintained the oppositions to the extent of directing the payment to the minors of one-eighth of the proceeds. There is an answer to the appeal, praying that the amount awarded be increased to the full distributive share of the minors fixed in the partition.

The argument on behalf of the bank maintains that the mortgage, having been acquired on the faith of the recorded titles of the major heirs, is not affected by any irregularities in the partition, or frauds of the major heirs; and it is insisted, in view of the duty of the tutor to protect the rights of the minors in the proceedings, the recourse of the minors should be on him and not against the bank, the mortgage in good faith.

As we think the good faith of the bank in acquiring the mortgage notes is unimpeached, we have been solicitous to find the basis for extending to it the protection invoked by the argument. The nature of the title on which the bank's mortgage depends confronts us at the outset. That title, spread on the public records, explicitly states the non-payment of the price by the major heirs. In effect the title was the recital of an adjudication and the unfulfilled obligation of the major heirs imposed by that adjudication. If this purchase by

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the heirs, without one dollar paid under it, is to be deemed sufficient to vest title in the purchasing heir, it must occur that notwithstanding the partition exacted by law and ordered by the court, it would be in the power of any heir by simply procuring and recording an adjudication to himself to appropriate the entire succession property by a sale or mortgage, and thus defeat the law and the order of court for an equal partition among all the heirs. It is true such a result would doubtless, be averted by recording the *proces verbal* in the manner requisite to preserve the vendor's privilege, but the heir, desirous of securing to himself the succession property, could obtain this advantage and profit by the omission to record the privilege, if this theory of title without payment of the price is to be sustained. The grave consequences of maintaining this theory is made more impressive by its operation on minors, illustrated in this case, if the theory is maintained, of the loss to the minors of their entire patrimony claimed to result from the mortgage of the property by the major heirs, without payment by them of a dollar of the price, and that non-payment, announced in the act, spread on the public records and notice to all.

The Napoleon Code gave the co-heirs a mortgage on the property sold to effect the partition for the payment of the price of the licitation, as well as to secure the return which by the partition one heir is to make to the other. Code Napoleon, Arts. 833, 2109. That Code required the registry of this mortgage within a fixed period, or the mortgage was ineffective. Formerly, our laws gave a similar mortgage, but there is none now, of the co-heirs, arising out of the partition proceedings, except that given by Art. 1333 of the Code, and that must be recorded to affect third persons. The mortgage under Art. 1333, restricted to the return of money the heir is to make, is not as broad as that given by the Napoleon Code. The deduction of the argument for defendant that the minor heirs had no mortgage for their distributive share when the bank took its mortgage note, is clear without reference to the Napoleon Code introduced in the argument for illustration. Assuming that the privilege of the vendor on the immovable sold applies in favor of the heirs, for none is given to the heirs specifically, it follows, too, there was no privilege, for none was recorded. Civil Code, Arts. 3271, 3274, amended by Act No. 79 of 1879. In our view the contention of the bank is sustained that the minors had no mortgage or privilege.

The defendant contends with great earnestness for the protection given by law to mortgages accepted on the faith of recorded titles. This protection has been of frequent recognition. Succession of Ashbridge, 1 An. 208; Boudreau vs. Bergeron, 4 An. 84; Broussard vs. Broussard, 45 An. 1085; Thompson vs. Whitbeck, 47 An. 49; Lacassagne vs. Abraham, 46 An. 1160. If the acts of sale to the heirs who granted the mortgage had announced the completion of the partition, including the payment of the price or settlement of the distributive shares, the most essential part of the proceeding; or if the acts had contained the recital that the property mortgaged had fallen to the heirs making the mortgage in settlement of their shares; or if in the acts there occurred any expression of completion of title, such acts, signed by the proper parties, placed on record, would present the controversy in a far different phase. The title of record here gave notice that the mortgagors were the heirs of J. P. David, and heirs, as it is determined in the cases cited by defendant, none the less take by inheritance through purchasers at sales to effect partitions. Troxler vs. Collier, 38 An. 431; Kernan vs. Baham, 45 An. 799. But the act also gave distinct notice that the price of their purchase had not been paid, and under the law all are apprised that the purchasing heir must pay the price as soon as the amount due by him is fixed by the partition. Civil Code, Art. 1342. In the case from 35 An. 546, Wade vs. Murray, the creditor took his mortgage on property which, as well as we can understand the case, had been bought by the tutor of minor heirs, the tutor himself being a co-heir. The suit was brought on behalf of the minors for the resolution of the sale, on the ground they had not been paid their shares. The court decided the resolutive condition did not apply to a partition sale, and maintained the title of the purchaser who bought on the faith of the mortgage by the co-heir who had acquired at the partition sale. In that case the purchaser, at the partition sale, was entitled to receive all that was due to his minor children; and the law deemed that payment accomplished when he bought. The payment was in legal contemplation the accompaniment of the purchase; that payment the act on the public records announced. The court, in the opinion, states the purchaser was the debtor entitled to receive, as tutor, that which he, as purchaser, owed his children. On the faith of that title the court maintained the mortgage the purchaser gave. The difference

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between that and the case here is, we think, obvious. Here, the title of the purchasing heirs shows the non-payment of the price, not as in the case of Wade, that payment accomplished. It imports the reverse. We pass then from the argument that seeks to support the mortgage, by the citation of the line of decisions maintaining rights acquired on the faith of titles exhibited by the public records, conveying ownership.

When the deceased leaves two or more heirs they hold the property of the succession in common. The definitive partition makes a change. The division in kind gives to each the title to that portion allotted to him. The sale consummated to effect that partition has the effect of passing title to the purchaser. If the purchaser is not the heir he completes title by paying the price at once. If an heir, he is to make payment, deferred, however, until the partition proceedings, and his share in the succession property is fixed. In either case payment of the price is exacted. Can we then hold that the purchase by the heir, subject to his obligation to pay the price, conferred title, though no price was paid. The court conducting the partition proceedings undoubtedly, can compel a fresh adjudication, if the purchasing heir fails to pay the price essential to effect the partition contemplated by the sale. The purchasing heir holds under that obligation weaved by the law into the right he acquires under the adjudication. Civil Code, Art. 1843. If without that payment he undertakes to mortgage or convey, it is difficult to perceive he conveys any greater right than he possesses. The minors owned one-eighth of the property. The mortgage by six of the heirs was operative on their interest. But it is our conclusion the purchase by them of the minor's interest, unaccompanied with payment of the price, did not divest their ownership, and their undivested interest was announced by the title in virtue of which the mortgage claimed by the bank was granted.

It is strenuously urged, on behalf of the bank, that the recourse of the minor is on their tutor for failure to record their claims. The law gives them no mortgage. There was, therefore, none to record. If it is intended by the argument to affirm, the tutor should have recorded the acts of sale to the major heirs as privileges, conceding that the privilege given to vendors exists in partition sales, we can hardly see our way clear to shield the bank from responsibility when the act of sale, in our view, on its face, announced that the mortgagor had title

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to only six-eighths of the property; that was the extent of their title by inheritance not enlarged by an uncompleted purchase.

It is urged by defendant that the partition and its homologation precludes this claim of the minors. If the price of the property had been paid, and the complaint was as to its distribution, it might well be insisted the homologation of the partition confined the minors to the appropriate proceeding to annul the partition. But the price never having been paid, the partition does not deal with the fund that should have been derived from the sales and distributed. We do not perceive any objection to the demand of the minors because of the partition and its homologation. The exceptions of *res judicata* based on the homologation of the partition, and that the lower court had no jurisdiction, do not strike us as capable of support, and have not been pressed. In the oral argument, if our appreciation is correct, there was the suggestion that the amount the minors should have received in this partition had been invested for them in the stock of a corporation organized by the major heirs. If this was done with the sanction of their tutor, we could not recognize that method of discharging the obligation of the major heirs of paying the price out of which the minors were to receive their distributive share.

We are asked on behalf of the minors to increase the judgment to the full amount of the distributive share of the minors fixed by the partition proceedings. This would be to treat the partition as final, and to enforce as a debt due by the major heirs the distributive share of the minors fixed by the partition. It is clear we can not deal with any personal liability of the major heirs on an opposition claiming the proceeds of the property. Nor can we give effect to any such debt on the theory that it is secured by privilege or mortgage, for neither exists. The judicial sale from the proceeds of which the minors seek to be paid was made under the mortgage by the major heirs. With neither privilege or mortgage their opposition affirms that sale, and all they can claim is their interest in the proceeds, *i. e.*, to the extent of one-eighth as heirs, irrespective of an attempted partition, which, in our view, did not divest their interest. For the debt due them by the major heirs, arising out of their appropriation of other assets of the succession, it seems to us redress must be sought in some other mode. The only standing the minors have in this proceeding is as that of coproprietors seeking as such to be paid to their interest out of the proceeds of the com-

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mon property sold under the mortgage granted by the other co-heirs. That was the relief given by the judgment of the lower court, and we think it is the measure of all that can be claimed in this proceeding.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

CONCURRING OPINIONS.

NICHOLLS, C. J. I concur in the decree. Where a piece of property belonging to a succession is sold for cash at a judicial sale made to effect a partition among the heirs, and it is adjudicated to the major heirs, who, instead of paying the purchase price, retain the same under the right accorded to them by Arts. 1848 and 2625 of the Civil Code, I think the title passes, but that the ownership acquired is an "imperfect" not a "perfect" ownership. The ownership becomes perfect only when the purchase price has been settled for between the heirs. "Imperfect ownership" (says Art. 492 of the Civil Code) "only gives the right of enjoying and disposing of property when it can be done without injuring the rights of others—that is, of those who may have real or other rights to exercise upon the same property."

A person taking a conventional mortgage upon property held by another under the circumstances above stated, takes it *cum onere*. His mortgage rights are subordinated to the payment or settlement of the price by the adjudicatee.

I think the rights of the co-heirs upon the property exist independently of a technical right of mortgage or privilege. It is a right inherent in the property affecting the very tenure itself of the ownership, which is not affected by omitting to record (or cause to be reinscribed when once recorded) in the mortgage records the *proces verbal* by which the price was retained. As stated in the succession of Canonge, 1 An. 210: though the right be one neither of mortgage nor privilege, it is "another right equivalent in many respects to that of mortgage in others superior for the purpose of securing the amount due." C. C. 2010, 2011, 2012, 2013, 2014, 2015.

BREAUX, J. In regard to the effect of the adjudication I concur with the Chief Justice, and in all other respects I concur with the opinion of JUSTICE MILLER.

Zeigler vs. His Creditors.

No. 12,171.

S. J. ZEIGLER VS. HIS CREDITORS.

Attorney's fees stipulated in a mortgage to be paid in case of non-payment of the debt at maturity are due when the mortgagee is bound to employ counsel to collect his claim, and such counsel represent him in the succession proceedings. *Mullan vs. Creditors*, 89 An. 397.

The sale in a succession of property on which there are mortgages, and the payment of the proceeds of sale into the hands of the administrator do not stop the running of interest on the claims. Interest runs on each claim until paid. *Caldwell vs. Creditors*, 9 La. 265; *Bronson vs. Baker's Creditors*, 1 La. 409; *Smalley vs. Creditors*, 3 An. 386; *Blouin vs. Liquidators of Hart & Hébert*, 30 An. 716.

If a person who marries again has children of his or her preceding marriage he or she can not dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from a brother or sister of any of the children who remain. This property by the second marriage becomes the property of the children of the preceding marriage, and the spouse who marries again has only the usufruct of it. Art. 1753 C. C.; *Scott vs. Doremus*, 10 An. 679; *Succession of Hale*, 26 An. 201.

Property so held by a surviving husband reverts by his second marriage, notwithstanding the alienations which he may have made when holding under his defeasible title, and the property returns free from all mortgage and incumbrances. C. C. 484, 548, 782, 789, 1842, 1503, 1521, 1522, 1555, 1558, 8268.

Where a surviving husband transfers an interest in a piece of property which had been bequeathed to him by his wife, to a third person, and such third person provokes subsequently a partition by licitation of the property between himself and his vendor, and at such sale the vendor becomes the purchaser, matters stand as to the effect of the reversion of the property by the second marriage as if the property had been always held by the original title.

Where a piece of property is held in indivision between a surviving husband (holding an interest thereon under a legacy from his deceased wife, also an *independent interest elsewhere acquired*) the children of such surviving spouse, and a third person, and such third person provoked a partition by licitation of the property at which the father bought, he acquired a valid title to the whole, notwithstanding there was an error at the time of the sale as to the extent of the interest of the various joint owners by reason of the fact that the portion of the interest held by the father from his wife, and then by reason of his second marriage reverted to his children. The minors were in court as defendants through special tutors, and the parties litigating were in reality all joint owners. The only effect of the error would be that in the ultimate partitioning or division as between the father and his children he would be chargeable toward the minors for the amount of their actual interest in the property.

Where a community is dissolved by the death of the wife, separate creditors of the husband acquire rights upon community property subordinate to the rights of the community creditors. *Ealer vs. Lodge*, 36 An. 117.

Where the community being indebted to the wife for paraphernal funds received by the husband and used for the benefit of the community—the wife dies—her claim passes to her minor children as their property; the subsequent appointment of their father as their tutor does not have the effect of altering the char-

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acter of the claim from one due to them by the community into one due them by their tutor. *McCall vs. Mercier*, 1 La. 347.

The liquidation of the community can not be operated by making a comparison, at any given date, of the value of the community property with the amount of a claim due by the community to the wife's heirs, and by assuming upon this comparison's showing that the community claim exceeded the value of the entire property (or one-half thereof); that therefore a d as resulting from that fact the wife's heirs have become vested in the absolute ownership of either the whole community property or one-half thereof. The legal title to the property does not shift by a mere comparison of values.

Where, at the time a surviving husband makes a cession of his property, the community between himself and his deceased wife remains unsettled (owning property and owing debts), the insolvent should place the community property (described as such), and in its entirety, upon his schedule and classify the creditors into community and separate creditors to the end that the property of the community be sold separately from the separate property, and its proceeds disposed of according to the rights of parties. The community should be liquidated inside of the insolvency. *Succession of McLean*, 12 An. 222.

When the legal mortgage in favor of a minor has been canceled and erased from the records by the final decree of a court seized with jurisdiction thereof in proceedings regular on their face, and with the advice and consent of a family meeting; a special mortgage has been substituted therefor, subsequent purchasers in good faith of the property will be protected by the decree. *Golding vs. Golding*, 43 An. 555.

In order that the property of a tutor be affected with a tutorship mortgage, the fact of the tutorship and the name of the tutor must appear of record.

Where a tutor holding an undivided interest in real estate purchases the entire property at a judicial sale made in partition proceedings, a tutorship mortgage affecting at the time of the sale of the tutor's undivided interest in the property remains unaffected by the sale.

MILLER, J., on application for rehearing. The ordinary creditor paying the debt of the mortgage creditor is subrogated of right to the mortgage. Civil Code, Art. 2160; *Boillieux*, 4th Vol., p. 544; 4 *Marcade*, p. 585; 7 *Duranton*, p. 94; *Napoleon Code*, Art. 1251.

When the proof administered fails to show ownership of the note by purchase, as alleged in the petition, but does show ownership by the subrogation accomplished by payment, the party will be allowed the benefit of the subrogation. 11 *Martin*, 26; 12 *Martin*, 242; 18 La. 528; 9 An. 534.

APPPEAL from the First Judicial District Court for the Parish of Caddo. *Taylor, J.*

A. H. Leonard, F. G. Thatcher and D. T. Land for Syndic, Plaintiff, Appellant; *A. H. Leonard* for Merchants and Farmers Bank, Opponent, Appellant; *Farrar, Jonas & Kruttschnitt* and *Leonard & Randolph* for S. Levy, Jr., Opponent, Appellant; *Alexander & Blanchard* for Mrs. M. F. Smith, Opponent, Appellant; *Wise & Herndon* and

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Howe, Spencer & Cooke for First National Bank of Shreveport, Opponent, Appellant; *Thigpen & Foster* for S. G. Dreyfous & Co., Opponents and Appellants.

T. F. Bell for Mary Lee and Vinnie Zeigler, Opponents and Appellees.

Argued and submitted June 3, 1896.

Argued and submitted on application for rehearing November 20, 1896.

Opinion handed down on application for rehearing January 4, 1897.

Rehearing refused January 4, 1897.

Opinion handed down June 22, 1896.

On October 24, 1892, S. J. Zeigler applied for a respite to the District Court of Caddo, where he resided. The respite was granted, but the debtor, failing to comply with its terms, was forced to make a cession of his property.

On the 30th of July, 1894, the District Court of the parish ordered that all the real estate belonging to the estate be sold according to law, on the terms and conditions fixed by the meeting of creditors held on July 14, 1894, before the district clerk, *ex-officio* recorder and notary public.

On the 8th December, 1894, George E. Gilmer, as under-tutor of the minors Mary Lee and Vinnie Zeigler, issue of the marriage of S. J. Zeigler with his deceased wife Sallie Vance, presented a petition in which he averred that S. Levy, Jr., and L. M. Carter, syndics of S. J. Zeigler, acting under the aforesaid order of court, had advertised for sale, as the property of Zeigler, certain property situated in the parish of Bossier, to-wit: an 83-128 interest in and to a lot in the town of Benton, which he described; an undivided 83-128 interest in a certain one-acre lot in the town of Benton, which he described; an undivided 83-128 interest in and to an undivided half interest in the north half and the north half of southwest quarter and northwest quarter of southeast quarter and west half of northeast quarter of southeast quarter of section 6, less forty acres sold Sam Stroy, and in and to southwest quarter of section 8, township 21, range 13, and

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east half of northeast quarter of section 1, township 21, range 14, in all 680 acres, known as the "Lewis lands;" also an undivided 83-128 in and to an undivided half interest in and to the east half of southeast quarter of section 23 and west half of southwest quarter of section 24 and south half and west half of northwest quarter of section 25, township 22, range 14, containing 560 acres, known as "Dutch John Hill lands." He averred that Zeigler in reality owned only an undivided half interest in said lands, the other undivided half being the property of the minor children of Zeigler, they inheriting the same from their deceased mother.

That said syndics have advertised for sale an undivided one-ninth interest in section 28, township 20, range 13, less southeast quarter of southeast quarter of said section, and that Zeigler has no interest therein, but it belongs to the minors by inheritance from their mother; that they have also advertised for sale the south half of "Buck Hall plantation," viz.: that part of section 24, township 19, range 14, and that part of sections 19 and 20, township 19, range 18, lying south of an east and west line commencing on the bank of Red river, in section 24, township 19, range 14, 331 1-8 links north of the quarter-section corner between sections 19 and 24, running east through fractional section 24 and sections 19 and 20 to a corner on west bank of William bayou, containing 376 acres, more or less.

He averred that said minors own an undivided half interest in said last described land by inheritance from their mother. That said syndics have also advertised for sale all the right, title and interest of said creditors as assignees of S. J. Zeigler in and to the southwest quarter of section 2; southeast quarter and east half of southwest quarter of section 3; section 10, west half of southwest quarter of section 11; northwest quarter and south half of southwest quarter of section 22, township 20, range 13, containing about 2160 acres, known as "Plain Dealing," less all blocks and lots in town of "Plain Dealing" sold heretofore by S. J. Zeigler, and less all portions of said place heretofore sold by him. He averred that the whole of said last described land belonged to said minors by inheritance from their mother. He averred that though Zeigler was the confirmed natural tutor of the said children he had an interest in the premises in opposition to the minors, and that it was necessary for him as under-tutor to represent them. He prayed to file his opposition, and that after due proceedings there be judgment setting

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aside the order of sale so far as it concerned the above alleged interest of the minors, and declaring them to be the owners of the property, as set forth in the opposition.

On the same day the under-tutor filed an opposition on the part of the minors, alleging that the syndics had advertised for sale as the property of Zeigler the following described real estate situated in Caddo parish, to-wit: an undivided 19-128 interest in lots Nos. 9, 10, 11 and 12, block 62, in the city of Shreveport, which property belongs to said minors. That said lots and improvements thereon belonged to the community between Zeigler and his deceased wife, and that Zeigler, the father, owned only an undivided half interest therein, but that Zeigler surrendered to his creditors as his property an undivided 83-128 interest in said property, whereas he only owns an undivided half interest, the remaining undivided half interest being the property of said minors, a part of which, as above set forth, is advertised for sale as the property of Zeigler. That said syndics had advertised for sale as the property of Zeigler that part of the plantation known as "Buck Hall," which is situated in Caddo parish, whereas Zeigler only owns an undivided half interest therein, the remaining half belonging to the minors. Said property belonged to the community between Zeigler and wife, and on the death of the wife her half interest vested in said minors.

That said syndics had advertised for sale as the property of Zeigler the following described land situated in Caddo parish, to-wit: The west fractional half of section 25, the northwest fractional quarter of section 36, the east half of southwest quarter, the southeast quarter of section 26, northeast fractional quarter and east half of west half of section 35, township 19, range 14, less 153 acres sold to L. P. Haynes. He averred that said minors became the owners of an undivided one-eighth interest in and to said last described land by virtue of the last will of William Haynes, deceased, and that after the death of Haynes, and during the existence of the community between their father and mother, their father acquired by purchase four-fifths of one-half of said land, and that one-half of this community interest became vested in said minors on the death of their mother, making their interest in said land an undivided thirteen-fortieths; that he filed the opposition as under-tutor for the minors for the reason that their father, who was their tutor, had an interest in the premises in opposition to that of the minors. He prayed that

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the minors be decreed to be the owner of the property, as set forth, and that the order of sale be set aside in so far as it concerned the interest of said minors therein.

The syndics answered these oppositions, pleading to the opposition bearing upon the sale of the property in Bossier parish first a general denial. They admitted advertisement of the lots in old Benton. They admitted that the 630 acres known as the Lewis lands and the 560 acres known as the Dutch John Hill lands were purchased by Zeigler during the life of his first wife, Sallie Vance, the mother of the minors represented by Gilmer as under-tutor, and that at her death her undivided half interest vested in her children and the other half in their father, but they averred that his first wife at her death left four minor children, of whom two died, and from whom their father inherited, and averred that his interest in said property when it was surrendered was nine-sixteenths and that of the minor opponents seven-sixteenths. They averred that the minors had no interest as owners in the south half of Buck Hall plantation, and had none when their father surrendered it. That the entire interest of the minors in said property was divested by a sale of the same made by their tutor under advice of a family meeting duly held and duly homologated by the court of their domicile, which sale was made to S. W. Vance, from whom Zeigler subsequently acquired it. They averred that the minors had no interest in the 2160 acres of land known as Plain Dealing, and that any interest said minors may have had was divested by a judicial sale made in the suit of W. C. Perrin vs. S. J. Zeigler *et al.* on the docket of the District Court for Bossier parish, in which suit the minors were parties and appeared.

The syndics pleaded to the opposition touching the sales advertised to be made in Caddo parish first a general denial. They admitted the advertisement for sale, as averred, of an undivided eighty-three-one hundred and twenty-eighth interest in lots Nos. 9, 10, 11 and 12, Block 62, city of Shreveport, with the buildings and improvements thereon, as property surrendered by Zeigler. They admitted that said property was acquired by Zeigler during the lifetime of his first wife, the mother of the opponents, and that at her death the mother's half vested in her children and the other half in the father, but they averred that the first wife left at her death four minor children, of whom two had died, from whom their father inherited, and that his interest in said property when it was surren-

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dered was nine-sixteenths and that of the minor heirs seven-sixteenths.

They admitted they had advertised for sale, as part of the property surrendered, that part of Buck Hall plantation, which was situated in Caddo parish, but they averred that when Zeigler surrendered it he owned it all, and the minors had no interest therein. That the interest of the minors therein was divested by a sale of same, made by their tutor, under advice of a family meeting duly held and homologated by the court of their domicile, which sale was made to L. W. Vance, from whom Zeigler subsequently acquired it. They admitted the advertisement of the property known as the Haynes place, less one hundred and fifty-three acres, but averred that the minors had no interest therein as owners. That after the death of their mother, a suit was instituted by a person owning an undivided interest in said land for a partition. That said minors were duly made parties to said suit, and appeared therein. That a decree was therein rendered decreeing the sale of said property to effect a partition, under which decree said property was sold and any interest therein held by said minors was divested. The minors, Mary Lee and Vinnie Zeigler, having been emancipated, made themselves parties to the oppositions filed by their under-tutor and adopted his allegations.

On the 20th February, 1895, the syndics filed a tableau of debts.

Mrs. M. F. Smith filed an opposition, claiming to be a privileged creditor of the insolvent. She opposed "on the ground that in addition to the amounts in said tableau for debt and interest on her mortgage note, and the amount paid by her for taxes on the property mortgaged to her, she was entitled to be placed on said tableau for the additional sum of four hundred dollars for attorney's fees as stipulated in her act of mortgage. She further claimed to be ranked on said tableau as a special privileged creditor on the fund realized by the sale of the two pieces of property upon which her mortgage rests, to-wit: the sum of nine thousand seven hundred and fifty dollars, to be paid by preference out of said proceeds the full amount of her mortgage debt, interest and attorney's fees and taxes, by preference over all other debts, charges or costs. She prayed that the tableau be amended as she claimed.

The First National Bank of Shreveport filed an opposition. The bank averred it was the owner of two promissory notes given by

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S. J. Zeigler, on May 14, 1890, due respectively at one and two years from date, each for the sum of three thousand three hundred and thirty-three dollars and thirty-three and one-third cents, with eight per cent. per annum interest thereon from date, payable to the order of Mrs. E. B. Griffin and by her endorsed in blank, less a credit on the first maturing note of one thousand five hundred dollars paid May 27, 1891, and less three hundred and seventy-three dollars and thirty-three cents for interest, which was also credited of May 27, 1891. That said notes were given as part of the purchase price of certain property described in their opposition, being fractional block sixty-four of the city of Shreveport, with the buildings and improvements thereon, and secured as to payment of principal, interest and attorney's fees by special mortgage on said property. That it became the owner of the first maturing note by purchase from the owner thereof on February 14, 1892, for value and in due course of business, and all the rights, privileges and actions belonging thereto, and further avers that inadvertently and through error and by its cashier, opponent gave on April 17, 1892, to S. J. Zeigler a receipt or certificate that it held as collateral security for the payment of any and all indebtedness due and to become due to it by said Zeigler the said note, together with other notes; whereas, in truth and in fact the said note was the property of opponent by purchase as aforesaid. That it became the owner of the second maturing note by purchase from the owner thereof on May 17, 1892, for value and in due course of business, together with all the rights, privileges and actions thereto belonging, including the vendor's lien and special mortgage on said described property to pay and satisfy same, and has continued to hold same as owners, and any receipt, certificate or paper of any kind given by opponent to Zeigler, that it held said note as collateral for any debt or obligation of said Zeigler to opponent, was inadvertently and erroneously given.

That on June 24, 1894, it paid to the sheriff, *ex-officio* tax collector of Caddo parish and State—the State and parish taxes due by said Zeigler on said property for the years 1892 and 1893, together with interests, costs, etc., aggregating the sum of one hundred and seventy-three dollars and eighty-five cents, and said sheriff and tax collector thereupon subrogated opponent to all the rights, liens and mortgages existing on said property to said parish and State according to law, and in virtue of said payment and subrogation opponent

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had a special lien, privilege and mortgage on said property in preference to all other claims for the reimbursement of said sum of one hundred and seventy-three dollars and eighty-five cents, with two per cent. per month thereon penalty for non-payment of taxes due the said State and parish, as aforesaid, and due to opponent from June 25, 1894, until paid. That on August 16, 1893, opponent paid to N. B. Murff, comptroller and tax collector of the city of Shreveport, the taxes due by said Zeigler to said city on said property for the year 1892, amounting to one hundred and three dollars and fifty cents, and thereupon in accordance with law the said comptroller and tax collector subrogated opponent to all the rights, liens and privileges theretofore held by said city on said property for payment of said taxes, and in virtue thereof it had a special lien and privilege on said property for the reimbursement of said sum with ten per cent. thereon per annum, from August 10, 1893, until paid, and entitled to be paid by preference over other creditors, out of the said property or its proceeds. That as holder and owner of said notes secured by special mortgage and vendor's privilege on said property opponent had superior rights, liens and privileges over all other creditors of Zeigler on said property, and entitles it to be paid the amount of said notes, costs, and five per cent. attorney's fee thereon by preference over other creditors out of proceeds of sale of said property, save and except the taxes hereinbefore set out.

That the syndics had sold the property for the sum of sixty-six hundred dollars cash, which they still hold and refuse to pay to opponent, and had placed opponent on their tableau as an ordinary creditor. Opponent prayed that its liens and privileges on said property and its proceeds be recognized and enforced for the amounts set forth, including costs, five per cent. for attorney's fees on said notes, and that the syndics be ordered to pay same out of the proceeds of said property.

The Merchants and Farmers Bank of Shreveport filed an opposition in which it averred that on the tableau of debts the syndic had placed a special mortgage in favor of the minor heirs of Mrs. Sallie Vance Zeigler, to the amount of seventeen thousand dollars on a certain interest in a certain property in Caddo parish, surrendered by said Zeigler, known as the "Haynes Place." Opponent averred that subsequent to said special mortgage, the said "Haynes planta-

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tion " was sold at a judicial sale made for the purpose of effecting a partition in a suit for partition instituted by one of the owners in indivision of said property, viz.: Nancy J. Mitchell against the other owners in indivision, including said minors who were parties to said suit; that at said sale S. J. Zeigler purchased said property; that by said sale any mortgage existing in favor of said minors on said property was extinguished and attached to the proceeds of said sale. That opponent is owner of certain notes executed by said Zeigler, secured by mortgage on said property, executed by Zeigler subsequently to said sale. That said mortgage is the only mortgage on said property, and the said property is not encumbered with that of the minors. They opposed the tableau, and prayed that said minors' mortgage, in so far as it concerns said property, be rejected and disallowed; that opponent be recognized as sole mortgagee having rights in said property.

Mary Lee Zeigler and Vinnie Zeigler, children of S. J. Zeigler and Sally Vance, filed an opposition, in which they represented that after their mother's death their father was confirmed as the natural tutor of the four minor children, issue of the marriage of their father and mother, and qualified by recording an extract of inventory, as required by law. That after qualifying he obtained a discharge on all his property from the minors' mortgage, except such portions as he presented to the court and the family meeting for a special mortgage. That he presented a list of property, which opponents described, in which he claimed certain undivided interests therein as owner and gave a special mortgage thereon in lieu of the minors' general mortgage. That at the time said special mortgage was given for seventeen thousand dollars on the above claimed interests of their father in said property, an account filed by him as tutor showed an indebtedness to his minor children of eighteen thousand six hundred dollars on June 28, 1887, which indebtedness had since been increased, until now it stood at fifty-nine thousand eight hundred and fifty dollars, as shown by account rendered since the emancipation of opponents, and that the valuation placed on property specially mortgaged in commutation of the minors' general mortgage was twenty-five thousand four hundred and eighty-five dollars. That this special mortgage given as above, together with the judgment of the court homologating the *proces verbal* of the family meeting recommending said special mortgage

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in lieu of the minors' general mortgage, was and is an absolute nullity, for the reason that said Zeigler did own but a small part of the property on which the said special mortgage was given, the said minors owning the remainder. That the only property thus specially mortgaged, which was owned by their father at the time, or was still now owned by him, was an undivided half interest in lots 9, 10, 11 and 12, in block 62, in city of Shreveport, valued at the time at seven thousand dollars, and an undivided three-tenths interest in the "Wm. Haynes lands;" that the "Haynes plantation" in its entirety was valued at the time at ten thousand eight hundred dollars, making the three-tenths of their father to be valued at three thousand two hundred and forty dollars, which, added to one-half of seven thousand dollars, the valuation of lots described, would give to their father on all the property included in said special mortgage an interest valued at the time at six thousand seven hundred and forty dollars. That even in this small part of the property thus specially mortgaged, he only owned the *residuum* after paying the debts due by the community that had existed between him and opponent's mother. That at the death of their mother their father was indebted to her in a sum of over forty thousand dollars for separate funds of their mother used by him for the benefit of said community. They represented that they were the only heirs of that claim, which is entitled to be paid by preference out of all the property that belonged to said community, and that all of the property included in said special mortgage that did not belong to opponents was property that belonged to the community that had existed between opponents' father and mother, and that all of the property belonging to said community would not be sufficient to pay the aforesaid debt, due their mother at the time of her death, and consequently there was no residue for their father to own, sell or mortgage. They set forth that they were the owners of all the other property included in said special mortgage in this way. That their mother, in her last will and testament, gave to her husband (opponents' father) an undivided quarter interest in all her property, but that their father married again on July 14, 1887, a few days after said special mortgage was given, and that before said second marriage, their father held the property given him by his deceased wife by a defeasible title which, on his second marriage, reverted to his said minor children by his

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first marriage, and that before said reversion he was forbidden by law to dispose of same in any manner. They averred that since their mother's death, two of the minor children left by her marriage with S. J. Zeigler had died, without issue, and that the share on all the reverted property, above described, became vested in opponents as the surviving children of their mother; that in the schedule of debts filed in the insolvency proceeding there was a failure to place thereon any indebtedness as due to opponents. They prayed that their claim for fifty-nine thousand eight hundred and fifty dollars, due them by their father, as tutor, be placed thereon, and for judgment restoring their general mortgage on all their tutor's property, as of date of filing of the inventory, and that their claim be placed on the schedule of debts as secured by general mortgage on all the property of their tutor, or its proceeds, the same as if there had been no attempted commutation of mortgage.

S. Levy, Jr., answered the opposition of the First National Bank. He claimed to be the owner of three promissory notes executed by Zeigler, secured by special mortgage on fractional block 64 in Shreveport, and that he was entitled to be paid by preference out of the proceeds of the same, which proceeds were insufficient to pay even his claim. He denied the allegations of the opposition of the First National Bank, and specially denied it had any preference over him. He averred that at the maturities of the notes claimed to be owned by the First National Bank they were paid by the maker, and by said payment they and the mortgage and privilege securing them were extinguished. That at the time of said payment opponent was the holder of the notes he now owns, and by said payment his notes took rank as a first mortgage on said property, and still occupied that rank; that subsequent to said payment Zeigler pledged the extinguished notes to the First National Bank to secure debts due by him to said bank, and attached them with other notes to her individual notes, evidencing the amount of her indebtedness. He denied that the First National Bank was then or ever was the owner of said notes, but averred that if it had any rights at all it was as holder of said extinguished notes as collateral; that for these reasons as well as those contained in an exception and plea of *stoppel* which he filed, he prayed that his rank as fixed by the *tableau* be sustained, and the opposition of the First National Bank be dismissed.

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The exception and estoppel thus referred to were that in the contracts between Zeigler and the First National Bank, under which it became holder of the notes on which that bank bases its claim, the bank acknowledged that it had received same from Zeigler, and held the same as collateral security to secure payment of his indebtedness to the bank, and the bank, by such written contract and acknowledgments, was estopped from denying same and claiming or attempting to claim that it held said notes otherwise than as collateral under said contract; that the bank can not question or attack the said contracts collaterally, or in an opposition to a tableau of debts filed by the syndics, but only by direct action to annul the same.

The District Court rendered judgment decreeing that the tableau of debts filed be corrected and amended, as follows: "It is ordered that the opposition of Mrs. M. F. Smith be sustained as regards her claims for attorney's fees; her claim for interest being rejected after date of sale of mortgaged property, and the tableau be recast so as to include the amount claimed by her for attorney's fees, and two per cent. per month for taxes paid.

"It is ordered that the opposition of the First National Bank of Shreveport, claiming to be placed on the tableau for two hundred and seventy-seven dollars and thirty-five cents, with two per cent. interest per month thereon for taxes paid the State and parishes of Caddo and Bossier, and ten per cent. per annum on the amount paid the city of Shreveport be sustained. It is further ordered that other opposition filed by this bank be and the same is hereby rejected.

"It is further ordered that the opposition of George E. Gilmer, under-tutor for the children of Sallie Vance Zeigler (Mary Lee and Vinnie Zeigler), claiming ownership of certain properties lying in Bossier and Caddo parishes, advertised for sale by the syndics herein, be sustained, and Mary Lee and Vinnie Zeigler are hereby recognized as owners of all the property claimed by them in their oppositions herein filed, and the syndics are enjoined from making any sale thereof.

"It is further ordered, adjudged and decreed that the general mortgage resulting from the inscription of extract of inventory in the records of Bossier and Caddo parishes in the tutorship of the minors Zeigler, the beneficiaries herein (now being Mary Lee and Vinnie Zeigler), No. — on the docket of this court, showing the

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minors' rights to be in amount fifty-nine thousand eight hundred and fifty dollars and seventy-six cents, is hereby recognized as outranking all mortgages predicated by S. J. Zeigler on any of the property owned or held by him since said recordation of said extract, and the syndic's account is amended so as to place thereon the sum of fifty-nine thousand eight hundred and fifty dollars and seventy-six cents in favor of Mary Lee and Vinnie Zeigler, to be paid by preference out of proceeds of all the property heretofore sold by said syndics over any and all creditors on the tableau filed, except the expense of selling the property, taxes and law charges.

"It is further ordered, and decreed that the said Mary Lee and Vinnie Zeigler are recognized as creditors of the community heretofore existing between S. J. Zeigler and his former wife, Sallie Vance Zeigler, to the amount of thirty-two thousand and forty dollars, and they are hereby placed on the tableau as creditors to that amount to be paid in preference to all other creditors on the tableau (except for taxes, law charges and expenses of administration herein) out of the proceeds of the community property already sold herein by the said syndic, or that has been surrendered by said Zeigler."

Mrs. M. F. Smith appealed from the judgment in so far as it rejected her claims and right to interest on her mortgage debt after the sale of the mortgaged property, and also in subordinating her special mortgage to the general mortgage of the minors and reinstating said mortgage of said minors to her prejudice.

S. Levy, Jr., and L. M. Carter, syndics, appealed from the judgment rendered against them on the oppositions of Mary Lee and Vinnie Zeigler and Mrs. M. F. Smith. The First National Bank of Shreveport appealed from the judgment, rejecting its opposition, reinstating the minors' special (general) mortgage in favor of Mary Lee and Vinnie Zeigler. S. Levy, Jr., in his own right, appealed from the judgment so far as it is in favor of Mary Lee and Vinnie Zeigler. The Merchants and Farmers Bank of Shreveport appealed from the judgment in favor of Mary Lee and Vinnie Zeigler. S. G. Dreyfous & Co. joined the syndics in their appeal and appealed from the judgment, in so far as the judgment subordinated the judicial mortgage in favor of the St. Louis & Southwestern Railway Company, to which they had been subrogated to the general mortgage of the minors, and to that portion of the judgment reinstating the said general mortgage to their prejudice.

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ON THE OPPOSITION OF MRS. M. F. SMITH.

The opinion of the court was delivered by

NICHOLLS, C. J. The judgment of the District Court, allowing Mrs. M. F. Smith attorney's fees, is correct. Her claim was not paid as it should have been, and the result of its non-payment was to bring about a condition of affairs which made the employment of counsel necessary for the protection of the creditors' rights. (See *Mullen vs. His Creditors*, 39 An. 397. *Succession of Duhe*, 41 An. 209.

The court erred in arresting interest in favor of Mrs. Smith from the date of the sale of the property on which her mortgage rested. *Caldwell vs. His Creditors*, 9 La. 265; *Brownson vs. Baker's Creditors*, 1 La. 409; *Smalley vs. His Creditors*, 3 An. 386; *Blouin vs. Liquidators of Hart & Hebert*, 30 An. 716.

In *Brownson vs. Baker* the court held that the promise to pay interest on a note entered into the obligation of a contract and constituted as much a part of the debt as any portion of the principal sum and continued to run until payment; that payment into the hands of an administrator of the proceeds of the property of a succession would not stop interest until the money is paid over to the creditor.

In *Collier vs. Creditors*, 12 Rob. 398, the court held, as we understand, that Collier was under no contractual obligation to pay interest on the Byrnes notes; that Byrnes himself was not bound to pay interest on them, as they had not been protested as was then necessary; that the liability of Collier to pay interest rested, if liability existed at all, on the fact that he had become the possessor of fruit-producing property. The court evidently held that the moment the property passed out of Collier and the insolvent estate into the hands of others, the fact on which the liability to pay interest rested, no longer existing interest should cease to run against the insolvent. We understand interest to have been claimed in that case generally—that is to say, *dehors* the fund produced by the sale of the property. We think the condition of affairs here is entirely different, and that Mrs. Smith was entitled to interest until she is paid.

ON THE OPPOSITION OF THE FIRST NATIONAL BANK OF SHREVEPORT.

The First National Bank of Shreveport, claiming to be the holder and owner of two notes, secured originally by mortgage on

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the Alston Warehouse property, in the city of Shreveport, asked to be recognized as such and to be held entitled to have a decree in its favor; that payment of such notes was still secured by special mortgage. Its claim to that effect having been rejected, it appealed. It is claimed by the syndics and Levy, a creditor holding a second mortgage on that property, that the notes were paid by the bank, and the mortgage securing the same fell with the payment; that the bank recognized the fact of such payment by consenting, afterward, to hold the same notes as collateral for subsequent new notes, made by Zeigler, representing an indebtedness due by Zeigler to the bank, at the time of the execution of the new notes; the new notes being payable a considerable time in the future, and including interest, and that included in these notes was the indebtedness which the mortgage notes represented and secured, and that the First National Bank is estopped from claiming to hold notes otherwise than as collateral. That the original claim was not valid. The notes in question were forwarded, at different times, in the early part of 1892 to the First National Bank of Shreveport for collection, by Hollins & Co., of New York, who were the holders of the same. Zeigler, the maker, was not able to pay them. The bank advanced the money, remitting the same to Hollins & Co. The bank placed the notes, when paid by it, in the cash drawer as so much cash, not charging Zeigler with it.

On the 9th of April, 1892, the amount of the note first sent forward by Hollins & Co. was, together with the amount of an open account then due by Zeigler to the bank (together with interest), embodied in the three notes we have spoken of, amounting to fourteen thousand eight hundred and ninety-six dollars, and delivered to the bank. Simultaneously with the making of these notes the bank executed and delivered to Zeigler a certificate, certifying that they held as security for the payment of all indebtedness then due, or might become due by him, the notes described in said certificate, among which figured the first note in question, which is thus referred to: "S. J. Zeigler's mortgage note dated May 14, 1890, payable twelve months after date from Mrs. E. E. Griffin for three thousand three hundred and thirty-three dollars and thirty-three and one-third cents, with credit endorsed on same May 27, 1891, for one thousand five hundred dollars, leaving the balance of the note extended to January 26, 1892, for one thousand eight hundred and

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thirty-three dollars and thirty-three cents, with eight per cent. interest from that date."

The second note was dealt with separately, but in the same way; that is to say, Zeigler executed a new note for the amount of the second note, payable ahead, with interest included, but the bank retained possession and control of the second note as it had retained possession (as we omitted to say) of the first note when the three notes were executed on the 7th of April, 1892. Both notes are still in the possession of the bank. It has never surrendered them or lost control over them. We think the evidence establishes that when these notes reached Shreveport for collection Zeigler told the bank that he was unable to pay, and that when the bank did remit the amounts to Hollins & Co., it was the understanding between the bank and Zeigler that in doing so "they were to have the same rights as Mrs. Griffin had, and to hold the notes against him"—that "the bank was to take up the notes and hold them with the same rights that the other parties had." We do not understand that the bank ever intended to act in such manner as to either absolutely extinguish the note or the mortgage, or that Zeigler expected or intended it to do so. The object of the parties was, that whilst operating a payment of the notes, so far as Hollins & Co. were concerned, the remittance to them should operate as a transfer of the notes to the bank. It is not claimed that there was, as between the bank and Hollins & Co., any agreement to sell the notes to the former.

A consideration of the facts connected with those remittances to Hollins & Co. has brought us to the conclusion that as between the bank and Zeigler the bank was entitled to hold the position of a purchaser of the notes.

The notes had been forwarded to the bank for collection, and it was its duty to collect. If it thought proper, instead of collecting, to make concessions to the maker, it would become bound to Hollins & Co. for so doing. The very fact of consenting to grant time to the maker, which was what was substantially consented to by the bank imposed upon the latter the obligation of paying Hollins & Co. This it did, and when it did so we are of the opinion it was entitled to hold the notes with its accessory rights (*Pritchard vs. Bank*, 2 La. 416), as owners with subrogation (see *Marcadé*, under Art. 1236, C. N.).

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We find it announced in Randolph on Commercial Paper, Sec. 1439, that "a payment by a mere volunteer paying a note is not a purchase; that the purchaser has no right to be subrogated to the rights of the holder, the circumstances under which he made the payment being a question of fact for the jury to determine; but that if a note is paid by one who is not a party to it, it will be presumed to have been done with the consent of the principal debtor, who should have made payment * * * The intention of a stranger to become a purchaser may be shown by him, and in such a transaction the intention of the parties govern, and although the stranger takes up the note for the maker, and, at his request, both the note and collateral mortgage may be kept alive in his hands. Ramsey vs. Daniels, 1 Mackey, 16 (1880); Boyce vs. Shiver, 3 S. C. 515 (1871).

"Where one advances money, at the maker's request, to pay a note, under an agreement that he shall hold it, he may bring an action on it as a purchaser against the makers and endorsers. Randolph, Sec. 1440; Horton vs. Manning, 37 Texas, 23 (1872). In a foot-note to that section we find it stated that where the bank at which a note was payable paid it and charged it to the maker, whose account was insufficient, it is a purchase, and it may bring its action against the maker." Watervliet Bank vs. White, 1 Denio, 608 (1845).

Under Sec. 1438 of the same author we find it stated that "if a note in the hands of the administrator of the last holder is duly accounted for him as so much cash, it will amount to a transfer of the note to him individually by operation of law." Smith vs. Gregory, 75 Mo. 121 (1881).

Obviously it was the duty of the administrator to collect, but if instead of collecting he charged himself with it in his dealings with the succession, and paid over the amount to those entitled to receive it, he was entitled to receive the note as if by a transfer. The maker could not claim as an extinguishment an act which was not intended for his benefit by the party who did the act. It was a matter of no moment to him, we assume, in that case, whether the succession or the administrator was the holder. If the party taking up a note does so for the qualified benefit of the maker, at his request, and under conditions, the latter can not free the act when done from the conditions under which it was done.

There is still another view to be taken of this matter. The bank

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was a creditor of Zeigler—a chirographic creditor, it is true, but none the less a creditor. The notes in question were mortgage notes, and the bank had an interest in taking them up. When it did so it acquired ownership of the same by legal subrogation as if by transfer. There is no inconsistency in plaintiffs' claiming to hold the notes as owners, and to hold them through payment by subrogation. Marcadé, under Art. 1386, C. N., sustains this view of subrogation.

Article 2161 of our Civil Code declares that subrogation takes place of right for the benefit of him who, being a creditor, pays another creditor whose claim is preferable to his, by reason of his privileges and mortgages.

Article 1251 is the corresponding article of the Code Napoleon.

In Dalloz "*Les Codes Annotés*," we find SUBROGATION thus referred to:

"L'Article 1251, 1, ne faisant aucune distinction entre les différentes classes de créanciers il en résulte que la subrogation légale n'est pas restreinte aux créanciers hypothécaires; elle a donc lieu de plein droit au profit du créancier chirographaire qui a payé un créancier hypothécaire qui lui est préférable." Douai, 20 November, 1889, J. G. Obligations 1094; *Observ.* Conf. *ibid.*; *Quest. Contrav.*

Laurent "*Droit Civil Français*," Vol. 18, on "*Obligations*" Sec. 69 says: "Le créancier chirographaire peut il profiter du bénéfice de l'article 1251, No. 1. Si l'on s'en tient au Code la question n'est pas douteuse. Le texte est conçu dans les termes les plus généraux; il parle des créanciers sans limiter le droit de subrogation à une certaine catégorie de créanciers. On objecte que l'article 1250 en disant que le créancier payé doit être préférable a raison de ces privilèges ou hypothèques à celui qui paye suppose que celui-ci est un créancier hypothécaire primé par un créancier antérieur et à l'appui de cette interprétation on invoque l'ancien droit. Cette interprétation restreint la loi; le texte s'applique au créancier hypothécaire, aussi bien qu'un créancier hypothécaire, car l'hypothèque est essentiellement un droit de préférence; et à l'égard de qui ce droit s'exerce-t-il? Régulièrement à l'égard des créanciers chirographaires; ceux-ci sont donc très intéressés à prévenir l'expropriation de leur débiteur, c'est-à-dire la perte de son crédit et la ruine en disintéressant des créanciers hypothécaires qui n'ayant rien à risquer seraient tentés d'user de toute la rigueur de leur droit * * * C'est l'opinion générale des auteurs, sauf le

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dissentiment de Grenier et la jurisprudence est d'accord avec la doctrine."

This court so held in *Weil vs. Ginnery Company*, 42 An. 496. We do not think the notes were novated. Novation is not presumed. The intention to novate must be clear. The notes were not surrendered. It is a matter of every-day occurrence for the maker of a note to give the holder thereof a new note, payable in the future, with interest included, leaving the old note in the hands of the holder without the slightest idea that the latter should be substituted or replaced by the former and extinguished by it. The taking of a new note in renewal of one secured by mortgage operates no novation, it has been held, where the first was not surrendered by the creditor. *Exchange and Banking Company vs. Walden*, 15 La. 434; *Short vs. City*, 4 An. 281; *Lalande vs. Breau*, 5 An. 508. The very fact that the note was declared to be a collateral by the cashier who made out the certificate we have referred to, shows that it was not considered or intended to be considered as an extinguished obligation. It would have been folly to have given up an existing secured obligation, and after extinguishing it, attempt to make use of it as a collateral. The bank pleads that any statement made by its cashier which would tend to show that the notes had been extinguished or novated, was made in error. We think the intention of the parties controls the situation. It is obvious to us there was no intention either to extinguish or novate the notes. We think there is no estoppel in this matter. If error was committed in the use of the word "collateral" no one was injured by it, and no one shifted or altered positions in consequence of it. We think the bank was authorized to offer testimony in support of the circumstances under which it paid the notes and the circumstances under which the new notes and certificate were given. The bank and Zeigler, the only parties to the transaction, were at liberty to rectify any error which may have occurred in the wording of the certificate, and we do not think that right was cut off in favor of the bank by Zeigler having gone into insolvency. We think the District Court erred in its action upon the opposition of the First National Bank in rejecting its claim to have the notes which it presented recognized as being still alive and as secured by mortgage, and to have the same enforced in its favor.

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ON THE OPPOSITION OF MARY LEE AND VINNIE ZEIGLER, CLAIMING OWNERSHIP OF PROPERTY.

Upon this branch of the case, we find in the transcript an agreed statement of facts, as follows:

S. J. Zeigler and Sallie E. Vance were married on the 13th of February, 1877.

They had children of their marriage, viz.: Susie, Saldee, Mary Lee and Vinnie Zeigler. Mrs. Sallie Zeigler died on the 8th day of April, 1885, leaving a large estate, and a will devising to her husband an undivided one-fourth interest in her estate, the balance being left to her other children, viz.:

Mary Lee, Vinnie, Saldee and Susie.

After the death of Mrs. Zeigler two of these children died, Susie on the 8th of January, 1887, and Sadie on June 3, 1891, respectively.

Zeigler contracted a second marriage July 14, 1887.

The "Plain Dealing" plantation, in Bossier parish, was inherited by Mrs. Zeigler, and was her separate property. After her death S. J. Zeigler, claiming under her will and as heir of her deceased child an undivided nineteen-sixty-fourths interest in "Plain Dealing," sold to W. C. Perrin, on the — day of —, A. D. 1887, an undivided nineteen-one-hundred-and-twenty-eighths interest in said property, by act of sale recorded in Bossier parish, on the — day of —, 1887. Subsequently Perrin instituted suit against Zeigler and against the minor heirs of Sallie E. Zeigler for a partition of "Plain Dealing." These minors were properly represented by special tutors appointed by the court, and issue was duly joined and answer filed by their tutor and under-tutor. Thereupon a decree was rendered in said suit by the District Court for Bossier parish, directing a partition by licitation. A writ of sale was issued, and after complying with all formalities and requirements of law, the property was sold at sheriff's sale, on the 24th of July, 1888, to S. J. Zeigler, for the price of three thousand dollars cash (received by the sheriff). This sale was duly recorded in the parish of Bossier, on the 24th of July, 1888.

A portion of the plantation was laid off in blocks and lots, constituting the present town of Plain Dealing.

Subsequently Zeigler sold portions of this property to John McAneny, J. E. Johnson and others, and mortgaged portions of it to others, as appears by deeds duly recorded in Bossier parish. Notes

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given to Zeigler for purchase of portions of "Plain Dealing," and notes given by him secured by mortgage on other portions of same are now held by S. Levy, Jr., and by the Merchants and Farmers Bank of Shreveport.

HAYNES PLACE, CADDO.

William Haynes, deceased, left a plantation in Caddo parish, known as the "Haynes plantation." By last will he left to Mrs. Sallie E. Vance undivided one-eighth interest in said plantation, and the remaining seven-eighths to quite a number of relatives.

During the lifetime of Mrs. Sallie E. Vance, S. J. Zeigler purchased the interest of James Haynes, Missouri C. Haynes, H. C. Haynes and John Haynes, and after her death purchased the interest of M. E. Bennett. In the year 1892, one of the heirs (viz.: Nancy J. Mitchell) instituted suit for the partition of the "Haynes place." The minor heirs of Mrs. Sallie Zeigler were made parties to this suit and were represented by special tutors. A judgment was rendered decreeing a partition by licitation. A writ of sale issued under which, after the compliance with all requirements of law, the place was sold to S. J. Zeigler for the price of four thousand eight hundred and thirty-two dollars, and deed was duly recorded in Caddo parish on the 7th day of March, 1892.

Subsequently, on April 27, 1892, Zeigler mortgaged this plantation to secure payment of a note for eight thousand dollars, now held by the Merchants and Farmers Bank of Shreveport.

On the 6th of July, 1887, Zeigler gave a special mortgage in favor of his children on the undivided 19-64 of 1-8 interest in "Haynes place" and on an undivided 83-128 of an undivided 1-8 interest therein and other lands described in opponent's petition.

RESIDENCE, SHREVEPORT.

Lots 9, 10, 11, 12, block 62, Shreveport, were purchased by S. J. Zeigler during marriage of his first wife, Mrs. Sallie E. Zeigler, and as community property.

The entire interest of Zeigler in said property is specially mortgaged to his minor children to secure his indebtedness to them as their tutor.

BUCK HALL.

On October 18, 1884, by sheriff's deed, before death of his first wife, S. J. Zeigler purchased the "Buck Hall plantation," lying partly in Bossier and partly in Caddo parishes.

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In 1884, and before the death of his first wife, Zeigler sold to S. E., M. B. C. and S. W. Vance an undivided 1-8 interest in "Buck Hall," in Bossier, and to S. W. Vance an undivided 1-8 interest in "Buck Hall," in Caddo parish.

On June 15, 1888, by a conventional partition, the Vances took the north half of "Buck Hall," Bossier, and S. J. Zeigler the south half.

In June, 1891, Zeigler sold to S. W. Vance the south half of "Buck Hall," Bossier, and his interest in "Buck Hall," Caddo, also the interest of the minor heirs of Mrs. Sallie E. Zeigler in said property, stated to be 21-128 interest (the sale of the minors' interest having been recommended by a family meeting and authorized by a decree of the District Court for Caddo parish, the court of the minors' domicile). On same day, June 19, 1891, Vance mortgaged "South Buck Hall," Bossier, and one hundred and nine acres of "South Buck Hall," Caddo, to N. F. Thompson, to secure mortgage notes aggregating five thousand eight hundred ninety-eight and 80-100 dollars.

Subsequently Vance gave a second mortgage on same property to secure note for \$——, acquired by S. Levy, Jr., who foreclosed mortgage, bought the property at sheriff's sale subject to the Thompson mortgage, and then sold it to Zeigler for \$——, for which Zeigler gave note secured by mortgage and vendor's lien on said property, which note is now held by Levy.

The lot in town of Benton containing three acres was acquired by Zeigler during the existence of the marriage with his first wife, and he, in similar manner, during the marriage, acquired the following other property:

Lot in town of Benton containing one acre.

The undivided one-half interest in six hundred and eighty acres, known as the "Lewis lands."

The undivided one-half interest in five hundred and sixty acres known as the "Dutch John Hill Lands."

The undivided one-half interest of one-third interest in section 28, township 20, range 13 east, in Bossier parish.

S. J. Zeigler married Sallie E. Vance on the 18th of February, 1877. She died on the 8th of April, 1885, leaving four minor children issue of her marriage with Zeigler, to-wit: Mary Lee Zeigler, Vinnie Zeigler, Susie Zeigler and Sadie Zeigler. Susie died on the 8th of January, 1887, and Sadie on June 8, 1891, leaving no issue.

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By the will of Mrs. Zeigler she bequeathed to her husband one undivided fourth of all her property. Zeigler contracted a second marriage."

Article 1758 of the Civil Code declares that "if a person who marries again has children of his or her preceding marriage, he or she can not dispose of the property given or bequeathed to him or her by the deceased spouse or which came to him or her from a brother or sister of any of the children which remain. This property by the second marriage becomes the property of the children of the preceding marriage and the spouse who marries again only has the usufruct of it."

This article has been specially discussed in *Cook vs. Doremus*, 10 An. 679, and *Succession of Hale*, 28 An. 201. In the former case this court held that "a surviving spouse who inherited one-fourth of the estate of a predeceased child of the first marriage forfeits the right of property in each estate by a second marriage and becomes only entitled to a usufruct thereof."

Under this decision and the article of the Code cited, we must hold that when Zeigler remarried, the interest which he held in the property which fell to him under his wife's will and that which he inherited from his two children Susie and Sadie Zeigler vested in Mary Lee Zeigler and Vinnie Zeigler, they being the heirs of their mother and sisters. The separate property of the wife became in its entirety the property of those two children and they became vested of the one undivided half of the community under and through their mother and sisters.

The law having declared that the property so bequeathed and so inherited by Zeigler could not be disposed of by him in any manner, we are of the opinion that the property when it reverted by the second marriage, did so free from all mortgages or encumbrances created by Zeigler, and of any transfers made by him, unless there should be shown some special fact or circumstance which, under the law, would do away with this general result of what is usually known and designated as "the right of return." C. C. 1342, 1503, 1521, 1522, 1555, 1558.

This result comes from the principle which is announced in Art. 3268, that "such as only have a right that is suspended by a condition and may be extinguished in certain cases can only agree to a mortgage subject to the same conditions and liable to the same extinction." C. C. 548, 484, 732, 779.

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It is claimed that Zeigler, on the day of , 1887, claiming under the will of his wife, and as heir of her deceased child, an undivided nineteen-sixty-fourths interest in "Plain Dealing," sold to W. C. Perrin an undivided nineteen-one-hundred-and-twenty-eighths interest therein. That Perrin instituted suit against Zeigler and against the minor heirs for a partition of the plantation; that these minors were properly represented by special tutors; that issue was duly joined by their tutor and under-tutor, and a decree of court rendered ordering a sale of the property to effect a partition by licitation; that Zeigler bought at this sale, and that the effect of this sale was to cut off the rights of the minors and give him a new title. We are not of that opinion. When he sold the property to Perrin, he attempted to sell that which did not belong to him; the sale was an absolute nullity. C. C. 2452. Neither Zeigler nor Perrin (holding under Zeigler) could, by resorting to an action of partition, strengthen titles which had no existence. The effect of the sale to Zeigler was simply to place him back into the position he occupied before the sale to Perrin.

The "Plain Dealing plantation" belongs in its entirety to May Lee and Vinnie Zeigler.

The two lots in Benton were acquired during the marriage between Zeigler and his first wife. In reference to this property the District Court says: "Zeigler's interest was one-half. This much he owned *pleno jure*, but anything further claimed under his wife's will was held by a defeasible title. The answer of the syndics' claims only nine-sixteenths or seventy-two-one-hundred-and-twenty-eighths interest, whereas they were proceeding to sell eighty-three-one-hundred-and-twenty-eighths."

We are of the opinion that the minors, May Lee and Vinnie Zeigler, are owners of an undivided half interest in that property as community property.

In regard to the "Lewis lands" and the "Dutch John Hill lands" the District Court says that "Zeigler during his first wife's life bought an undivided half interest in them. The dissolution of the community vested in him one-half of an undivided half or one-quarter interest in full right. The syndics in their advertisement claimed that Zeigler owned eighty-two-one-hundred-and-twenty-eighths interest, while in their answer they claim for him only nine-sixteenth or seventy-two-one-hundred-and-twenty-eighths. He

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really owned one-half of one-half, or one-quarter interest in the whole tract as community property." In that conclusion we concur. May Lee and Vinnie Zeigler own one undivided one-quarter interest in that property as community property.

The claim in respect to residence property in Shreveport, known as lots 9, 10, 11 and 12, in block 82, is thus disposed of by the District Court: "This property was acquired during the community between Zeigler and his deceased wife, and at the dissolution of the community, Zeigler became seized of one-half undivided half interest therein, subject to the payment of community debts. But the syndics claimed and advertised for sale eighty-three-one-hundred-and-twenty-eighths, the excess being claimed under the will of Mrs. Zeigler, further increased by his inheritance from his two deceased children. If our view of Art. 1753 of the Civil Code be correct, Zeigler only has his community half—the other interest claimed for him having been defeated by his second marriage, and this community interest he owns subject to the payment of community debts." The court's view of Art. 1753 being correct, his conclusion that Zeigler only owned an undivided half interest in this property as community property is correct.

The minors, May Lee and Vinnie Zeigler, own an undivided half interest in the property as community property.

The opposition as to the Buck Hall property was dismissed and does not seem to be involved in the litigation before us.

The opposition in respect to the Haynes lands was thus disposed of below: "The contest as to the Haynes lands stands upon a different footing, for unlike Plain Dealing property, there did exist in these Haynes lands a real diverse ownership affording a true basis for the partition suit and its consequent sale. The suit was brought by one of the Haynes heirs, who did own a certain part, for a partition, and the minors were represented by special tutors. It is said that they should have been represented by their under-tutor, but if this be true then the irregularity is one of that kind which is cured by the judgment rendered ordering a sale of the whole property. This sale is defective, nevertheless, in including Zeigler's fourth interest under his wife's will, which, as we have seen, had lapsed by his second marriage."

The District Court, having gone thus far in its opinion, makes no distinct or direct announcement as to the rights of parties in the

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Haynes property, but proceeds to say: "This brings us to a different branch of the opposition." It then proceeds to discuss the opposition filed by Mary Lee and Vinnie Zeigler themselves after their emancipation.

Taking up ourselves the question of the "Haynes Lands" controversy, we are of the opinion that under and through the partition sale made in that matter, Zeigler acquired a valid title to the whole property. There is no claim that the proceedings themselves were irregular—that the proper parties were not before the court; but it is contended that because Zeigler and the minors went into that proceeding under an erroneous assumption as to the extent of their relative interests in the property, the validity of the sale was, to a certain extent, at least, affected; that to a certain extent the sale left the minors' rights therein untouched. We do not think so. The proceedings in partition are not before us, but we understand that the suit was brought by one of the heirs of Haynes who unquestionably had an interest in the property for a partition of the same against S. J. Zeigler and the minors Mary Lee and Vinnie Zeigler—all of whom were, in fact, joint owners. That at the sale under a judgment of court in that matter ordering a sale of the property S. J. Zeigler bought. If all the parties in interest were before the court properly represented and the proceedings were regular, we are of the opinion that an error in the extent of the interests of the various joint owners in the property would not affect the validity of a sale made in the proceeding which would be otherwise legal. The only effect of this error would be that in the partition subsequently made, Zeigler would have to be ultimately made responsible to the minors for their actual interest in the property. He would hold the property under the sale, under a legal liability to settle with his children according to their real rights. We think the Haynes plantation belongs in its entirety to S. J. Zeigler.

The District Court, in its reasons for judgment, thus disposes of the opposition filed by Mary Lee and Vinnie Zeigler themselves after their emancipation.

"It is in evidence that at the time of Mrs. Zeigler's death her husband was indebted to her in the sum of thirty-two thousand and forty dollars for separate funds of the wife used for himself, or the benefit of the community. When Mrs. Zeigler died this claim against the community passed by inheritance to her children. Two of these

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children have since died, and their parts have gone to the children, who are opponents herein. The interest in the assets of a dissolved community is simply an interest in the *residuum*—that is what remains after paying community debts (Newman vs. Cooper, 46 An. 1485). The only debt due by the community is to these children, amounting to thirty-two thousand and forty dollars, and Zeigler had no interest in the assets of the dissolved community which he could sell to the detriment of this claim, which Mrs. Zeigler while living had a right to enforce by action. The interest of the minors as shown by the inventory taken in 1885, immediately after the death of their mother, was valued at eleven thousand three hundred and fifty dollars. If one-half interest was conceded to them the valuation of all the community property was twenty-four thousand seven hundred and fifty dollars. If, however, Zeigler, in addition to his half, claims one-fourth of his children's half it would give him five-eighths and his children three-eighths. This would make the valuation of the whole of the community assets thirty-one thousand two hundred and sixty-six dollars—still not enough to pay that community debt. Hence there could result no *residuum*.

"There remains one more contention of these minors, and that is their rights against their father as tutor which have been established at sixty-seven thousand seven hundred and seventy dollars and fifteen cents, while their interest in property in Bossier parish and Caddo parish was inventoried at ninety-eight thousand four hundred and forty-three dollars. Considering that this inventory was taken on the basis that Zeigler was owner of one-fourth of his wife's property by virtue of her will, the minor's property was increased to that extent by the reversion of this one-fourth when Zeigler married. A little while before his remarriage, Zeigler provoked a family meeting, and, with its approval, secured a judgment of this court restricting the minors' mortgage to certain specified property and canceling it as to all other of the tutor's property. The property presented and accepted for this so-called special mortgage was appraised by experts appointed by the court at twenty-five thousand dollars. A mortgage for seventeen thousand dollars was recommended and taken, and declared to be twenty-five per cent. over and above the tutor's indebtedness to the minors as shown by the account homologated in June, 1887. But a scrutiny of this account will fail to show how this amount was arrived at. The

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account shows a declared balance of only three thousand five hundred and ninety-seven dollars and ninety-one cents, and this the *proces verbal* of the family meeting, as well as the act of mortgage, declares was not the amount. It results, therefore, there was no previous liquidation made, according to law, ascertaining the amount due the minors. The commutation of the minors' general mortgage is for the convenience of the mortgagor. It is allowed to him in order that his property may not be unnecessarily burdened. All that the law requires is that the interests of the minors should be protected, but protection is required, and nothing less will satisfy it. *Gillet vs. Jure*, 15 An. 417; 23 An. 554; *Isaacson vs. Mentz*, 33 An. 595."

How was the protection secured in that case? By assessing the property specially mortgaged, which was wrongfully supposed to belong to the tutor, at twenty-five thousand dollars, and in an agreed special mortgage of seventeen thousand dollars, declaring this mortgage to be twenty-five per cent. in excess of the amount as ascertained to be due to the minors, substituted in place of the general mortgage. That ascertainment of the amount due, according to Art. 331 of the Code, should have included "all interests which will probably accrue." That account now stands, including all interests which have accrued, at the sum of sixty-seven thousand seven hundred and seventy dollars and fifteen cents, and thus shows how inadequately have the interests of these minors been guarded by this special mortgage, even if Zeigler owned the interest in the premises thus mortgaged, as claimed by and for him.

The other property retained under the mortgage retained by the family meeting is 83-128 interest in lots 9, 10, 11 and 12 in block 62 in the city of Shreveport, admitted to be community property, and 83-128 interest in an undivided half interest in the "Haynes lands."

Zeigler's 83-128 interest in the lots in block 62 was made up in this way: his community interest and one-fourth of one-half under his wife, augmented by his alleged inheritance from his deceased minor children. The same is true of his interest in the "Haynes lands," which interest was his half or community interest in such portions as he purchased during the community and such portions as he purchased after the death of his wife.

Under Art. 1753 of the Civil Code, this undivided one-fourth interest, thus held under the will of his wife, was a defeasible interest which passed to his surviving children when he remarried, and which

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he could not dispose of. But by far the larger part of the property included in the special mortgage was the sole property of the minors. He could give no legal mortgage on the property of another. In the Succession of Anna B. Nusbaum, 34 An. 902, the court held that the special mortgage, to be given by the natural tutor in lieu of the general mortgage of the minors, on all his property, must be executed by the tutor on his own property, and could not be given by a third person for him. If such transactions are to be sustained by the courts, it can well be said, in the language of Chief Justice Bermudez, in 33 An. 49-56, *Life Association of America vs. G. L. Hall*, "if the general mortgage, which the law has created for the protection of the rights of minors, over which it watches with jealous eye and great solicitude, could be effectually destroyed, as is attempted to be done in this case, the shield with which it is said it covers them would be nothing but a thin vapor, a real mockery."

The judgment of the court in respect to this opposition, as we have seen, recognized Mary Lee and Vinnie Zeigler as creditors of the community between S. J. Zeigler and wife to the amount of thirty-two thousand and forty dollars, and ordered that they be placed on the tableau as creditors to that amount, to be paid by preference over all other creditors on the tableau (except for taxes, law charges and expenses of administration) out of the proceeds of the community property already sold by the syndics or that had been surrendered by Zeigler. It further recognized the general mortgage arising from the inscription of the inventory in the records of Bossier and Caddo parishes in the matter of the tutorship of the minor Zeigler, being (now) Mary Lee and Vinnie Zeigler, showing the minors' rights to be in amount fifty-nine thousand eight hundred and fifty and seventy-six-one hundredths dollars as outranking all mortgages predicated by S. J. Zeigler on any of the property owned or held by him since the recording of said extract, and that the syndic's account be amended so as to place the sum of fifty-nine thousand eight hundred and fifty and seventy-six-one hundredths dollars in favor of Mary Lee and Vinnie Zeigler, to be paid by preference out of the proceeds of all the property heretofore sold by the syndic over and above all creditors on the tableau filed, except the expense of selling the property, taxes and law charges.

If we assume as correct the statement that at the time of the death of Mrs. Sallie Vance Zeigler the community was in-

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debted to her in the sum of thirty-two thousand and forty dollars, and that that sum has not been paid, the consequence declared by the court would follow, that the husband's rights in the community property being subordinated to the payment of the community debts no creditor of his could acquire rights upon that property except being also subordinated to the payment of such debts. In *Ealer vs. Lodge*, 38 An. 117, this court said that "no act of the widow in her own name or as tutrix and no act of the heirs whether of age or not could deprive the creditor of the community of his right to be paid out of the common property in preference to any right of ownership which the widow or the heirs acquired thereto at the dissolution of the community." It has been repeatedly held that community creditors are entitled to a priority on community property over the separate creditors of the spouses. This preference is secured neither by a privilege nor by a mortgage technically, but is the result of the tenure or character of the interest of the spouses in the property. It is analogous to the right of preference of partnership creditors over the creditors of the individual partners. Let us suppose the case of a wife dying to whom the community is indebted thirty thousand dollars or forty thousand dollars—that the husband should have qualified as tutor of his minor children, and after placing of record an inventory which carried with it, by its registry, a general mortgage in favor of his minor children as security of their rights should have caused the general mortgage to be restricted to specific property and a special mortgage to have been additionally given on the same property, but the balance of the property freed from mortgage of any kind. Would the question of mortgage *vel non* on the father's property control the question of the extent of the rights of his minor children in the community property or determine what their right of payment out of that property would be as compared with the right of the creditors of their father to be paid out of that property? Undoubtedly not—their right is not only based upon the fact of being creditors, but upon the fact that their father's rights (and therefore the right of any one holding under him) are conditioned upon an adjustment or settlement of the community, and in this settlement the wife holding a claim against the community would stand *quoad* any separate creditor of the husband as any other creditor of the community—so long as the community is

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not liquidated or settled the children have a claim upon community property for the debts due them by the community, a protection really higher and greater than through either mortgage or privilege. Registry is not necessary for this protection—it springs, as we have said, from the tenure itself under which the property is held. In the case of *LeBleu et al. vs. North American Land and Timber Company et al.*, 46 An. 1465, we were called on to explain the difference between a minor's right as resulting from ownership and that resulting from the liability of the tutor on his property through the tutorship. Property rights in that case were shown to be totally independent of the liability of the tutor as secured by mortgage. In this case the rights of the minors as creditors of the community are so interconnected with the property rights involved that they can not be dissevered.

If it be true that Zeigler during the lifetime of his wife received of her paraphernal funds the sum of thirty-two thousand dollars which he applied for the benefit of the community, that claim descended to the wife's heirs as part of her succession. If the evidence of that fact had been placed of record payments to the wife would have stood secured by the wife's mortgage on all his property. Had the husband qualified after the wife's death as tutor under these circumstances and he had registered an extract of inventory as required by law, these two facts would not have produced as their result a legal forced payment from himself as debtor to the wife to himself as tutor of the children, wiping out thereby the wife's mortgage and substituting in lieu of it the minors' mortgage and making payment to the children dependent upon and following the fate of the latter mortgage. The claim would remain still as a claim due to the wife and her heirs supported by the wife's mortgage. There would be no merger of the original claim into another claim from the facts stated. *McCall vs. Mercier*, 1 La. 347.

We do not think, however, that when a father has made a surrender of his property, and has placed all the different pieces of community property on his schedule, declaring that he surrendered an undivided half interest therein, that his minor children, keeping out of the insolvent proceedings the interest they may have, in the community, can insist that the undivided interest of the father in each of these specific pieces of property should be sold, and that they should come directly against the proceeds of that particular portion or

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interest in the community property, and apply them, by preference, to the payment of their community claim. The character of the interest they have in the community is the same as that of their father. Their ultimate rights as owners and as creditors are to be determined by a general liquidation of the community.

This liquidation can not be operated by making a comparison, at any given date, of the community property with the amount of a claim due by the community to the wife's heirs, and assuming upon this comparison's showing that the community claim exceeded the value of the entire property (or of one-half thereof), that, therefore, and as resulting from that fact the wife's heirs became vested in the ownership of either the whole community property or one-half thereof. The legal title could not shift by a mere comparison of values. In order to bring about such a result there would be required some direct act by and from which there should be made a transfer. The creditors should have the right to have these estimates of value tested as to their correctness by actual judicial sales, and the *residuum* of the parties legally determined. We are of the opinion that, where the wife having died, the community is the owner of numerous pieces of property and there are also community creditors (among them the heirs of the wife), and the community has never been settled, that the husband, when he goes into insolvency, must surrender the community property in its entirety, and so return it, and in classifying his creditors, must classify them into community and separate creditors—that the community should be sold separately and distinct from the separate property and the proceeds accounted for according to the rights of parties. We think the proceeding should be assimilated to the case of the community rights opened by the prior death of the husband, in which case the community is liquidated inside of the husband's succession—and, therefore, that the community, in case of a cessation, should be settled inside of the insolvency. Any other course would give rise to interminable difficulties. The law has not provided a method for the settlement of the community upon the death of the wife, and the method of making this settlement and determining the rights of parties has been, and is still, a most embarrassing one to dispose of.

With reference to the claim set up by the children against their father, resulting from the tutorship itself, which the District Court

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recognizes as one supported by a general mortgage in full force and covering all the property of the husband from the date of the recording in the books of the Recorders of Bossier and Caddo parishes of the extract of inventory referred to, we are constrained to differ from our learned brother, reluctant as we are to do so in view of the great wrong and injury which may result to the minors.

We find in the record under date of July, 1887, a judgment of the District Court of Caddo parish, authorizing S. J. Zeigler, as natural tutor of his minor children, to execute a special mortgage in favor of his minor children, on certain designated property in lieu of the general mortgage then existing against him as tutor, and decreeing "that said special mortgage, when duly approved, accepted and recorded, shall operate as and authorize the cancellation in full of said general mortgage and prior special mortgages now existing against him as tutor in favor of the said minors." We find in the record a special mortgage executed by Zeigler under said order or judgment approved and accepted by the District Judge and recorded, followed by a cancellation of the general mortgage upon the books of the recorders of the parishes of Bossier and Caddo. We find that this judgment or order of court was based upon proceedings of a family meeting ordered to be convened and convened under an order of the District Court upon the application of S. J. Zeigler to consider the application made by him to authorize him to execute such special mortgage in lieu of the general mortgage. That to that family meeting was submitted Zeigler's application, and that said family meeting declared that the property offered to be specially mortgaged "was of sufficient value to secure the rights of the minors in principal and interest"—that they recommended that "the tutor be authorized to execute a special mortgage on the property for seventeen thousand three hundred and seventy-one dollars, being twenty-five per cent. above the amount due the minors, as shown by the account filed by the tutor that day, said mortgage to stand in place of the general mortgage on said tutor's property, resulting from registry of extract of inventory in said tutorship, and also in place of a special mortgage then resting on the lands in Bossier parish, purchased by the tutor from Mrs. Stockwell."

We find that the under-tutor, though not present at the meeting, subsequently approved and signed the proceedings.

We find a report of experts appointed under Art. 331 of the Civil

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Code, appraising at twenty-five thousand dollars the property offered to be specially mortgaged.

We find that on the same day that the family meeting was convened Zeigler filed what he styled his first annual account as tutor with the minors. In this account he charges himself up with the value of the real estate, as shown by the various succession inventories with personal property on hand, and as having received, cash, rents and accounts, ten thousand seven hundred and eighty-three dollars, the whole amounting to seventy-one thousand eight hundred and thirteen dollars. He then credited himself with the same properties *plus* a number of bills paid by him and expenses of the minors for two years, two thousand dollars, the whole amount by the account to sixty-eight thousand two hundred and fifteen dollars and fifty-nine cents. Deducting one amount from the other he charged himself with having on hand at that time, and due the minors, three thousand five hundred and ninety-seven dollars and ninety-one cents.

No allusion is made to any amount as being due to his wife, nor is there any attempt to show the general ultimate condition and situation of the community or the succession.

There was a reference in the proceedings of the family meeting to an account of tutorship as having been filed that day, which we presume was the one we have just given out. There was no reference to the report of experts.

The attack made by the minors upon these proceedings, it will be seen, declares them absolute nullities, for the reason that only a small part of the property mortgaged belonged to Zeigler, the balance belonging to the minors themselves. In the brief in their behalf it is claimed that "there was no real prior liquidation made according to law ascertaining the amount due the minors, also that there is a discrepancy in the amount for which the special mortgage was given (seventeen thousand dollars), and that stated to be due to the minors (three thousand five hundred and ninety-seven dollars). It is claimed that any one looking at the proceedings and the acts would see at once there was error somewhere, and should have been placed upon guard and inquiry. The utterly insufficient protection given to the minors through this special mortgage is pressed upon us, it being asserted that the amount presently due by the tutor to his minors, interest included, amounts to sixty-seven thousand dollars.

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If this be true and the minors' security for the acts of the tutorship are made to depend upon the mortgages affecting the property specially mortgaged, there is no doubt the minors will have suffered a grievous wrong through the carelessness, indifference, ignorance or want of judgment of those controlling their interests and their fortune, but the question is, has this court any power to correct it as matters stand, if at all, or under any circumstances?

The syndics claim that the proceedings in question are not absolute nullities; that they must have effect until set aside; that the minors have not attempted to do so, but have ignored them, and are acting in this proceeding as if they had never existed; that they can not be thus collaterally disposed of and on an opposition to an account. They cite in behalf of this position *Graham vs. Hester*, 15 An. 148; *Holmes vs. Dabbs*, 15 An. 501; *In re Routon*, 11 An. 621; *Succession of Anger*, 38 An. 492.

They contend that even if they be wrong in this respect that the judgment in this case could only be one dismissing the demand, because there is no legal evidence that opponents are creditors in any amount of the insolvent. That neither the community claim of the minors nor their tutorship claim is established; that before proceeding as they have done they should have had a judgment against their father and tutor; citing *Elizabeth Gibbs et al. vs. Joseph A. Lam & Co.*, 29 An. 526; and *Successions of William E. Edwards and Lavinia Wilson*, 32 An. 457. That they have no judgment against their father and mother, and come before us resting solely upon his uncorroborated extra-judicial acknowledgments of indebtedness and his uncorroborated testimony to the same effect. That they are seeking to obtain really in the present proceeding, for the first time, a judgment in their favor. They claim that a mere agreement between Zeigler and his children as to his being indebted to them in a certain amount does not furnish a legal cause for the action taken by the minors. That the minors themselves have been emancipated only by notarial act, and are not authorized to accept extra-judicial accounts from their tutor.

We think that opponents have not established with sufficient certainty the claim which they advance as for paraphernal moneys of their mother received by their father and applied to the benefit of the community, and that we are not at present justified in recognizing them as creditors of the community from the amount claimed paya-

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ble by preference out of the community over separate creditors of their father.

We think it is useless to pass upon these particular objections, as we are satisfied from an examination of the proceedings that even if this particular claim of opponents were supported by a judgment to its full extent, and even if the attack they now make were made in form other than that which it has taken, it would fail certainly as against parties holding mortgages on the property. We find the proceedings of a character such as to justify the public dealing with Zeigler to have supposed that his property other than that specially mortgaged was free from mortgage. In *Barnard vs. Ewin*, 2 Rob. 407, this court said: "That as soon as the special mortgage is accepted and recorded the general mortgage resulting from the tutorship ceases to exist as to third persons, and the mass of the property will be released even though an error may have been committed in ascertaining the amount due to the minor at the time of executing the special mortgage.

In *Casanova's Heirs vs. Avegno*, 9 La. 196, this court concurred with the District Court in announcing as law that, where a person desirous of purchasing property from a tutor is bound to inquire how the rights of the minors are secured; if he find that these rights are secured by a special mortgage he is justified in concluding that the general mortgage in favor of the minors has ceased to exist, especially when recurring to the Court of Probates he finds that the special mortgage has been accepted by a family meeting and by the court, and that it is on the responsibility of the under-tutor and family meeting the special mortgage is accepted; once accepted and recorded the general mortgage resulting from the general mortgage ceases to exist with regard to third persons (on other property.)

In *Pierce vs. McMahon*, 15 La. 218, it was declared that where the tutor observes all the forms required by the act of 1830, authorizing a special mortgage to be substituted in lieu of the general one resulting from the tutorship, it frees the other property from all encumbrances, and a purchaser can not set it up in avoidance of the sale. That if the minor, having attained the age of majority, were to seek to enforce his legal mortgage, he might be answered that by a judgment of a competent tribunal in a proceeding in which he was duly represented the general mortgage had been waived and a

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special one substituted in its place. That whether it was regarded as a contract or a judicial proceeding, it was equally conclusive upon the minor, all the forms required having been observed under the personal responsibility of the under-tutor. That act expressly renders the under-tutor liable personally to the minor in case of the inefficiency of the new security, unless he make opposition and his opposition is overruled.

In *Golding vs. Golding*, 43 An. 555, the court said: "When the legal mortgage in favor of a minor on the property of the tutor has been canceled and erased from the records by the final decree of the court seized with jurisdiction thereof in proceedings regular on their face, and with the advice and consent of a family meeting a special mortgage has been substituted therefor, subsequent purchasers in good faith of the property will be protected, and can not be affected by charges of fraud and conspiracy in the proceedings to which they were not parties and of which they were ignorant."

It has been repeatedly held that though third persons acting under orders of court must look to the jurisdiction of the court, the truth of the record concerning matters within its jurisdiction can not be disputed. *Bissel et ux. vs. Irwin's Heirs*, 14 La. 146; *Ball's Administratrix vs. Ball et al.*, 15 La. 182; *Brosnahan et al. vs. Turner*, 16 La. 440; *Rhodes et al. vs. The Union Bank of Louisiana*; *Gray vs. Lowe*, 7 An. 468; *W. Shaffet et als. vs. James C. Jackson et als.*, 14 An. 154; *Succession of John Gurney*, 14 An. 622; *Succession of Antoine Hebrard*, 18 An. 485; *Eleanor W. Woods et al. vs. Hilliard H. Lee et als.*, 21 An. 505; *Susan A. Webb vs. Amelia E. Keller*, 26 An. 596; *Mrs. Nancy M. Fraser vs. Zyliez*, 29 An. 536; *Heirs of Herriman vs. Janney*, 31 An. 280; *Heirs of Thomas Nesom vs. Julius Weis et al.*, 34 An. 1004; *Beulah Webb, Wife, et al., vs. Amelia Keller et al.*, 39 An. 55.

In *M. D. C. Cane, Tutrix, et al., vs. J. D. Cawthon, Sheriff, et al.*, 32 An. 953, this court said: "There can be no dispute at this day as to the entire correctness of the proposition that persons dealing *bona fide* are protected by final decrees rendered by courts having jurisdiction of the persons and subject matter before them, and this whether said judgment be right or wrong, honest or fraudulent. See 32 An. 953.

In the *Succession of Elliott*, 31 An. 81, the court said a mortgage creditor was not permitted to take advantage of the substitution of

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a special mortgage in lieu of the minors' general mortgage, based upon a fraudulent account which had been homologated, though the general mortgage had been raised by the court upon the advice of a family meeting; but it is obvious that it was because the particular creditor was considered as having had knowledge of the fraud and not in good faith.

We are of the opinion that the judgment of the District Court authorizing the erasure of the minors' general mortgage, followed as it was by the erasure of the same from the mortgage records, still stands in full force and effect as to all third persons and must continue to stand—the tutorship having now terminated and all the property of the tutor having been surrendered to his creditors, and that the judgment below recognizing the general mortgage of the minors' mortgage on all of the property of the tutor from the date of the recording of the extract of inventory is erroneous, and that that mortgage must be restricted to the property specially mortgaged by Zeigler to secure any amount which he may owe as tutor to the minors. We are of the opinion that the extent of the indebtedness of the tutor has not been sufficiently shown.

The syndics in their brief call our attention to the fact that upon the extract of inventory on the faith of the registry of which the general mortgage upon all the property of the tutor is claimed the name of S. J. Zeigler does not appear, and, as resulting from that fact it is claimed that the recording of said extracts do not inform the public that any mortgage existed in favor of opponents on the property of a "*person named*" and the recording is inoperative. *Ford vs. Tilden*, 7 An. 533; *W. S. Donnell et als. vs. E. Gant et als.*, 24 An. 189; *Ernest J. Smith vs. Miss Lizzie Lewis*, 45 An. 1457, are relied upon in support of this position.

The extracts recorded in Caddo were as follows:

In District Court of Caddo.

Tutorship of Minors }
Sallie Vance Zeigler. } No. 1814.

I hereby certify that the inventory taken in the above named tutorship in Caddo parish shows the appraised value of said property sixty-three thousand four hundred and twenty-eight dollars and eight cents (\$63,428.08).

Given under our hand and seal this 11th day of May, 1885.

(Signed)

W. P. FORD,

Clerk and Ex-Officio Recorder and Notary Public.

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The certificate as to the value of the Bossier property was similar, in every respect, to that of Caddo parish, the amount being thirty-five thousand and fifteen dollars.

Upon the margin of each certificate of the record book in Caddo parish seems to have been written the following:

(Endorsed) Canceled by special mortgage substituted. Recorded in Mortgage Book "R," page 70, June 30, 1888.

W. G. BONEY,

Deputy Clerk and Ex-Officio Deputy Recorder, Bossier Parish.

The same certificates were placed of record in Bossier parish. On the margin of the Bossier certificates we find the following entry:

CANCELLATION.

"STATE OF LOUISIANA, }
" Parish of Caddo. }

"By reason of the registry of the special mortgage executed by S. J. Zeigler, natural tutor of the minors of Sallie Vance Zeigler, deceased, recorded on pages 512 and 516, inclusive, of Vol. "J" of Mortgages, in lieu of the general mortgage existing against him as natural tutor, by authorization of the judge of the First Judicial District of Louisiana, I hereby cancel this legal mortgage in full.

"Done officially on this the 13th of July, A. D. 1887.

(Signed)

"J. H. CABEEN,

"Deputy Clerk and Ex-Officio Deputy Recorder, Bossier Parish.

Counsel of the minors contend that the marginal entries showing the cancellation of the general mortgage indicates the party who was the tutor of the minors, and cures any defect in the original entries. The Bossier parish marginal note of cancellation is much fuller than that of Caddo parish, the latter referring simply to a special mortgage having been given in lieu of the general mortgage, and indicating in what record that mortgage could be found.

Appellants claim that the minors who contend that the special mortgage was as to them absolutely null and void, should not be permitted to contend at the same time that such mortgage is effective in their favor as against third persons. If in point of fact and law the marginal entries sufficed to perfect the original record of the certificates upon the mortgage books there would be no inconsistency in the minors taking advantage of that fact. An act bad for one purpose may be good for another.

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The question comes back to ascertaining what effect these marginal entries had. Did the mention in the Bossier records of the name of S. J. Zeigler as being the tutor of the minors of Sallie Vance Zeigler made for the first time in an entry of the recorder, showing a simultaneous cancellation of the general mortgage under order of court, convey such notice and give such effect to the original record of the certificates as to make them good and efficacious under the law from that time forward, as if the name of Zeigler as tutor had appeared originally in the records? We think not. The marginal note is no part of the extract of inventory filed. It is upon the instruments themselves which are recorded and as recorded by which the rights of parties are to be rested?

ON THE OPPOSITION OF THE MERCHANTS AND FARMERS BANK OF
SHREVEPORT.

S. J. Zeigler specially mortgaged to secure his minor children nineteen-sixty-fourths of an undivided one-eighth, and eighty-three-one hundred and twenty-eighths of an undivided one-half of the Haynes plantation to secure the payment of seventeen thousand dollars. Subsequently, one of the joint owners, Nancy J. Mitchell, instituted a suit for a partition against the other joint owners, including the minors who were represented, and obtained a decree for a sale of the entire property to effect a partition by licitation. At the sale S. J. Zeigler became the purchaser. It is claimed that the effect of the sale was to extinguish the mortgages and transfer the mortgage rights to the proceeds. The purchase of the property by one of the joint owners, upon whose share rested a mortgage in favor of his minor children as tutor, left the minors' mortgage rights intact on his actual original interest in the property. *LeCarpentier vs. LeCarpentier*, 5 An. 497; *Life Association of America vs. Hall*, 33 An. 49.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment of the District Court, recognizing Mrs. M. F. Smith as entitled to four hundred dollars for attorney's fees be and the same is affirmed; but that the judgment of said court, arresting interest upon her mortgage claim from the date of the sale of the property mortgaged be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that she is entitled to interest thereon until final payment.

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It is further ordered, adjudged and decreed that the judgment appealed from, rendered upon the opposition of the First National Bank of Shreveport, rejecting the demand of said bank; that the notes, of which it declared itself the holder and owner in said opposition, be declared secured as to payment (subject to the partial payment made thereon) of principal, interest and attorney's fees by special mortgage and vendor's privilege on fractional block 64 of the city of Shreveport, and upon the buildings and improvements thereon, be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that said notes (subject to the partial payment therein admitted in the pleadings), together with interest and attorney's fees, be and the same are recognized as secured by special mortgage and vendor's privilege on fractional block 64 in the city of Shreveport, and upon the buildings and improvements thereon.

It is ordered, adjudged and decreed that the "Plain Dealing plantation," described and referred to in the opposition of George E. Gilmer, under-tutor of the minors Mary Lee and Vinnie Zeigler, be and the same is the property of the said minors in its entirety, the interest therein which S. J. Zeigler held at one time under the will of his wife, Sallie Vance, and under and by inheritance from his children Susie and Sadie Zeigler, having vested in the said Mary Lee and Vinnie Zeigler by reason of the second marriage of S. J. Zeigler and by reason of their inheritance from their sisters Susie and Sadie Zeigler, who died intestate without issue, free from all mortgages and encumbrances placed thereon by S. J. Zeigler, and regardless of all transfers made by him.

It is further ordered, adjudged and decreed that S. J. Zeigler is the owner in its entirety of the "Haynes lands" or "Haynes plantation" described in the pleadings, but that the mortgage of the minors, as it stood at the time of the partition of said property instituted by Nancy J. Mitchell, remained unaffected by said partition and the sale herein made.

It is further ordered, adjudged and decreed that the interest of S. J. Zeigler in lots Nos. 9, 10, 11 and 12 in Block 62, in Shreveport, is limited to his community interest therein in the community which existed between himself and his deceased wife, Mary Lee and Vinnie Zeigler, his children having an equal and similar interest in the same.

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It is further ordered, adjudged and decreed that the interest of S. J. Zeigler in the lot in the town of Benton, containing three acres—the lot in the town of Benton containing one acre—in the lands known as the “Lewis lands”—in the lands known as the “Dutch John Hill lands,” and in section 28, township 20, range 13 east, in Bossier parish, all described in the pleadings, is limited to his community interest in the community interest acquired in and to said property—Mary Lee and Vinnie Zeigler, his children, having an equal similar interest therein and thereto.

It is further ordered, adjudged and decreed that the judgment appealed from recognizing and decreeing as being still operative and in full force the general mortgage in favor of the minor children in issue of the marriage of S. J. Zeigler with his wife, Sallie E. Vance, upon all the property of S. J. Zeigler by reason of his tutorship of said minors, dating from the date of the recording in the mortgage books of extracts of inventory. (“In the matter of the tutorship of the minors Sallie Vance Zeigler”), regardless of the raising, under judgment of court, of said general mortgage upon all the property of said Zeigler other than upon the property authorized by said judgment to be specially mortgaged to secure the rights of said minors, be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the rights of said minors against the said S. J. Zeigler and his property as resulting from his tutorship be restricted to the general and special mortgage in their favor on the property authorized to be specially mortgaged and specially mortgaged in their favor. It is further recognized that any community indebtedness which may be due by the community between S. J. Zeigler and Sallie E. Vance to the minors Mary Lee and Vinnie Zeigler by reason of paraphernal funds of their mother. Sallie E. Vance, having been received by their father S. J. Zeigler and applied to the benefit of said community, is entitled to be paid out of the proceeds of the sales of the mass of the community property by preference over S. J. Zeigler or any separate creditor or creditors of the said Zeigler. The amount of the indebtedness claimed by the minors Mary Lee Zeigler and Vinnie Zeigler against their tutor, S. J. Zeigler, and that claimed by them as being due to them by the said community having not been satisfactorily established, the judgment of the District Court in their favor for fixed amounts and ordering them to be presently paid by preference out

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of the community property and the property struck by the tutorship mortgage in their favor is hereby annulled, avoided and reversed and this cause is remanded for the purpose of fixing the same, with leave on their part to amend their pleadings.

It is further recognized that the syndics' cession of S. J. Zeigler brought into the insolvency the community property of the community between S. J. Zeigler and his wife Sallie E. Vance in its entirety, and it is ordered that the said community be liquidated and settled inside of the said insolvency according to law and the rights of parties.

It is further ordered, adjudged and decreed that the judgment of the District Court, in so far as it conflicts with the views herein expressed, be and the same is annulled, avoided and reversed, but otherwise it stands affirmed.

It is further ordered that the syndics recast their entire account and make the same conform to the views herein expressed and the judgment herein rendered.

ON APPLICATION FOR REHEARING.

MILLER, J. It is insisted on the argument for the rehearing that under our law there is no legal subrogation in favor of the ordinary creditor who pays the mortgage creditor of the common debtor. The cases cited, that the stranger, *i. e.*, not bound, or with no intent in discharging the debt, acquires no right of the creditor by paying it, are familiar. *Curtis vs. Kitchen*, 8 Martin, 706; *Chalmers vs. Stow*, 3 N. S. 310; *Nolte vs. Their Creditors*, 6 N. S. 175; *Nicholls vs. His Creditors*, 9 Rob. 476; *Shaw vs. Grant*, 13 An. 52, and others of similar type. It may be that in some of these cases the party making the payment was an ordinary creditor of the debtor. But it is quite certain that in none was the subrogation contended for on the ground that the party claiming the subrogation was a creditor of the debtor. The only case in which we find discussed the right of the ordinary creditor to the mortgage of the creditor, whose debt the ordinary creditor discharges, is that in 42 An., where the right was conceded, but denied, on the ground peculiar to that case stated in the opinion. So much for the aid afforded by our jurisprudence.

While there is some variance in the French authorities on this question, it must be conceded, we think, that the subrogation of the

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ordinary creditor, acquired by his payment of the mortgage creditor, is put beyond controversy. The theory of this subrogation is, that the creditor of inferior rank, in making the payment to the mortgage creditor, has an interest in the property of the common debtor, the pledge of both creditors. Until the superior mortgage debt is discharged, the creditor of inferior rank gets nothing. He is concerned, therefore, in making that payment of the superior debt which prevents a sacrifice of the common pledge, and affords the creditor who makes the payment the opportunity to make the property bring enough to pay and leave a surplus after the superior debt is satisfied. The whole reasoning on which this legal subrogation rests, points to the ordinary creditor as entitled to it, and excludes the contention that the legal subrogation is restricted to the second or third mortgage creditor who pays the debt secured by the elder mortgage. The reason of the subrogation in favor of the creditor whose mortgage is inferior exists, we think, with equal if not greater force in favor of the ordinary creditor whose payment stops the sacrifice of the property under the writ of the superior creditor. In Boileux, Toullier, Marcadé and others of the French commentators, we find the most emphatic recognition of this subrogation of the ordinary creditors. In Dalloz Codes Annotés, the first paragraph that strikes the eye in connection with Art. 1251 of the Napoleon Code, corresponding with that of our Code 2160 on the subject, is the affirmation of the legal subrogation arising from the payment of the mortgage debt by the ordinary creditor. After all, on this question, is not the Code itself enough? Its conciseness of expression that subrogation takes place in favor of the creditor who pays another whose debt is preferable by reason of his privilege or mortgage, would certainly seem to preclude any aid for interpretation. We think reason and authority, as well as the text of the Code, sustains our opinion that gives the bank in this case, the creditor of Zeigler, the subrogation to that mortgage securing the debt the bank discharged. Napoleon Code, Art. 1251; 4th Boileux, p. 544; Marcadé, p. 585; Civil Code, Art. 2160; 1st Dalloz Les Codes Annotés, p. 1070, paragraphs Nos. 5 *et seq.*

It is, however, claimed that with all the facts spread before us in this record, conferring on the bank this legal subrogation, the bank is to be denied the right, because in its opposition the bank claimed ownership by purchase of the notes, and hence can not claim own-

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ership by subrogation. Payment to the mortgage creditor is the incident both of purchase and subrogation. The accounts of the bank with Zeigler were the subject of examination by both parties in the lower court, and that the bank was Zeigler's creditor when it paid the mortgage debt was proved and conceded. In the development of this proof and the payment by the bank, its legal subrogation, if our view of the law is correct, is conclusively shown and is patent on this record. Can we deny the legal subrogation because the bank calls it a purchase? We have knowledge that it has been held that a party claiming ownership and failing in that contention, can not contend for a privileged debt. Such relief would be *ultra petendum*. We are apprised, too, that it has been held that on a rehearing the party can not ask recognition of a title not contended for before, and in one of the cases actually repudiated in the original argument. *Nugent vs. Buisson*, 35 An. 108; *Silbernagel & Co. vs. Baker*, 23 An. 699; *Weil vs. Ginnery Co.*, 42 An. 492. We find in this case no such difficulties as presented themselves in the cases cited. The bank proved all the facts requisite for the subrogation, claimed it on the original argument, and it was allowed on our original opinion. Our courts have never been inclined to deprive the litigant of rights, because in supporting the title he asserts, there is some variance between the method of acquisition alleged and that proved, the proof tending to sustain the substantial issue, i. e., title, and conforming with and not exceeding the demand. It is true, in this class of cases, or in some of them, at least, the fact of no objection interposed to the testimony has had its influence. In this case no objection on the ground of variance was made. But irrespective of that, in our view, when the testimony adduced to sustain the title alleged exhibits only the variance from that alleged as to the mode of acquiring title, we must give effect to the testimony. *Bryan and Wife vs. Heirs of Moore*, 11 M. 26; *Langline and Wife vs. Broussard*, 12 Martin, 242; *Powell vs. Aiken & Gwinn*, 18 La. 328; *Nichols vs. Morgan*, 9 An. 534.

Our re-examination of this case, however, leads to the conclusion that Zeigler is entitled to the credit of five hundred and fifty-three dollars and five cents, of date the 2d March, 1892. The credit accrued after the notes were given, and we can perceive no reason why it should not be allowed.

It is therefore ordered, adjudged and decreed that our former

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judgment remain undisturbed, with this modification, that Zeigler be and he is hereby allowed a credit on the mortgage notes, the subject of opponent's opposition, of five hundred and fifty-three dollars and five cents, of date the 2d March, 1892, with interest from that date.

No. 12,216.

E. S. OGDEN ET AL., HEIRS OF JULIA SCOTT OGDEN VS. THE LELAND UNIVERSITY.

The heirs of a deceased wife are not bound to await a liquidation of the community before resorting to a petitory action to recover their share of the community. *Murphy vs. Jurey & Gillis*, 9 An. 785; *Tugwell vs. Tugwell*, 32 An. 848; *Glasscock vs. Clark*, 38 An. 584.

In a petitory action brought by parties claiming to own undivided interests in an immovable against parties possessing and claiming to hold in indivision the whole immovable, defendants are entitled to plead the prescription of ten years, although an action for partition is only barred by thirty years. Under such a condition Arts. 1304 and 1305, C. C., regulating prescription and possession between co-heirs and co-owners, do not govern. *LeBlanc vs. Roberson*, 41 An. 1028.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

F. C. Zacharie for Plaintiffs, Appellants.

J. Q. A. Fellows and *J. B. Grinage* for defendant, Appellee.

Argued and submitted November 5, 1896.

Opinion handed down November 30, 1896.

Rehearing refused January 4, 1897.

This is a petitory action brought by the heirs of Julia Scott Ogden, deceased wife of Judge Abner Nash Ogden, for the recovery of certain property in the parish of Orleans. In the brief of plaintiffs' counsel the action is referred to as follows:

"The action was first brought by only a portion of the heirs, but by supplemental petition; the others joined so that all the heirs now sue for the undivided half of the community formerly existing

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108 421
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between Mrs. Ogden and Judge Ogden. It embraces two squares of ground with the buildings valued at ten thousand dollars, which then stood in the village of Greenville, now a part of New Orleans. Mrs. Ogden died in 1856. Her succession was opened, but the property in question was not sold in course of administration. During the war between the States, Judge Ogden being a registered enemy, was obliged to go with his family into the Confederate lines. Shortly afterward, in 1864, these two squares of ground were sold by the sheriff under mortgage foreclosure proceedings, the court appointing a curator *ad hoc* to represent Judge A. N. Ogden. The property was bought by William T. Hepp, who resold the property to Judge A. N. Ogden on December 15, 1865. Judge Ogden, thinking he had then a valid title to the whole of the property, sold the two squares, buildings, etc., to the Leland University on April 6, 1870. This suit was instituted January 16, 1895, by plaintiffs claiming that all of these sales were absolute nullities, in so far as they, as heirs of their mother, were concerned, *quoad* her one-half of the community property in contest.

Judge Ogden died in August, 1875.

By special agreement of counsel, all the facts alleged in the petition are admitted to be true. The answer is the plea of ten years' prescription by possession for more than that length of time under title translatif of property in good faith. There being no issue of fact, the case was argued and submitted to the court *a qua*. The decision was adverse to the plaintiffs and in favor of defendants, sustaining the plea of prescription of ten years. From that decision plaintiffs have taken an appeal.

It was admitted on the trial that the mortgage debt under which the foreclosure proceedings took place was a community debt of the community between Judge Ogden and his wife.

The opinion of the court was delivered by

NICHOLLS, O. J. Plaintiffs' claims are that upon the death of Mrs. Ogden, in 1856, the ownership of one-half of the community property devolved *eo instanti* upon her heirs, subject to the payment of the community debts, and subject to the right of Judge Ogden to the usufruct during his life. That Judge Ogden and his children were therefore co-proprietors when the attempt to foreclose the Tuyes

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mortgage was made; that the sale made under those proceedings, at which Hepp bought was an absolute nullity, as a curator *ad hoc* could not be appointed to represent a registered enemy; that it has been so held in *Dean vs. Nelson*, 10 Wallace, 172, and *Lasere vs. Rochereau*, 17 Wallace, 439, and that this court has since those decisions adopted that doctrine, and it now forms a part of the jurisprudence of the State. Manning's Unreported Cases, page 341, is cited in support of that assertion. Counsel concedes that under the jurisprudence existing at the date of the sale from Hepp to Judge Ogden, and of the latter to the Leland University, the title to Hepp would have been held good, but he contends that in reality the sale was an absolute nullity, that the later decisions determine absolutely that fact; that it followed, therefore, that the ownership of the heirs of the wife stood in *statu quo* unaffected by that sale; that Judge Ogden's subsequent purchase from Hepp could not, in any way, affect the status of the heirs; that through that purchase he only bought back his own half interest in the property; that even that interest was not affected by the foreclosure sale, as it was an absolute nullity, even in so far as his own half interest was concerned; that the payment by him to Hepp could not be regarded in any other light than as a payment of the mortgage debt; that the property stood thereafter just as it stood at Mrs. Ogden's death, one-half owned by Judge Ogden and one-half by her heirs, clear of mortgage; that Judge Ogden bought the property from Hepp under an error of law as to the title and the sale by him of the whole property (that is, his own one-half and the one-half of his children) was another absolute nullity based on an error of law; that as the registry laws did not require the recording of titles by descent, it was the legal duty of a party proposing to purchase property to ascertain whether the person from whom he proposed to buy was, or was not, a married man; whether the particular property had not been purchased during marriage; if so, whether or not the wife had died, and if she had died, to ascertain and know the precise steps which had been taken to divest her heirs of their interest in the community property; that not only was Hepp committed to a knowledge of all the facts of the case, but Judge Ogden, buying from Hepp, and the Leland University buying from Judge Ogden (as a purchaser under Hepp), were also committed to a knowledge of the facts connected

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with Ogden's original title, and the subsequent facts bearing upon and affecting that title (citing heirs of Guillotte vs. City of Lafayette, 5 An. 388; Bennett vs. Bennett, 12 An. 254, and Williams vs. Hunter, 13 An. 477). That Hepp, Judge Ogden and the Leland University being held to a knowledge of the facts connected with the title, if they purchased the property under the erroneous belief that the foreclosure proceedings were regular and legal and divested Judge Ogden and his wife's heirs of their interest in the property and that Ogden, in purchasing, acquired from Hepp a new title to the property in its entirety and could legally convey the whole, such error in doing so was exclusively one of law, not of fact. That this error of law could not be made by them the basis of prescription of ten years, as an error of law could not be made the means for acquiring property (C. C. 1846). They contend that Hepp's title, under the foreclosure proceedings, and Ogden's title under Hepp, were not titles which the Leland University received honestly believing that Hepp and Ogden (under Hepp) were really the owners of the property for they knew or should be held to have known the facts connected with the title, and error on their part, if error there was made, was simply one of law. Counsel say that the Leland University relied upon Hepp's title to Ogden, which title was derived by him through the illegal foreclosure proceedings, and that the errors of law relative to these titles were such as defendant should not have fallen into had it made due inquiry, that it was its duty to have made proper investigation, which would have disclosed that the property was community property, and that the heirs had never been legally divested of their half interest therein (citing Heirs of Guillotte vs. City of Lafayette, 5 An. 388; Bennett vs. Bennett, 12 An. 254, and Williams vs. Hunter, 13 An. 477).

Counsel in discussing his case has overlooked the fact that the property rights of these parties, when presented to the court to be tested simply and exclusively by the direct and immediate legal results of an assumed absolute null adjudication to Hepp, followed by a sale by Hepp to Ogden, and by Ogden to the Leland University, free from any question of prescription, would be something essentially different from their presentation with the element of prescription thrown into the investigation. It might well be granted, if the adjudication to Hepp was an absolute nullity, that a sale made by him to Ogden and by the latter to the Leland University would fall

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under an attack by the heirs of Mrs. Ogden through a petitory action if such an action had been brought in time for no question of prescription to arise, and yet the same result would not be led up to when the rights and obligations of parties would be complicated by a claim of ownership subsequently acquired through the ten years' prescription. A new factor, governed by special rules and leading to special legal results, would enter into and control the problem. Let it be granted that the proceedings in the foreclosure proceeding were null and void; that Hepp acquired no title, and that being the immediate and direct adjudicatee at the execution sale, he himself had no such title as would form in his favor a basis for prescription; let it also be granted that Judge Ogden, the original owner, buying from Hepp, would occupy a similar position, would it follow that a vendee from Judge Ogden would also be necessarily cut off from urging prescription? Unquestionably not. Counsel of plaintiff insists that defendant relies upon the title to Hepp, but on its own behalf defendant repudiates that idea, and says that it relies exclusively in this case upon its purchase from Judge Ogden, and the legal results flowing as to prescription from that purchase; that neither it nor the court are called upon or authorized to go back of its own purchase to investigate whether, in law, Ogden was the real legal owner of the whole property. If the defendant had made the investigation of facts which plaintiffs claim it should have made, it would have found that Ogden, at the time when he was a widower, and when his children would have no interest in property then purchased by him, had made a purchase from Hepp, claiming to be the owner. There would be no legal requirement for defendant to go into an examination of Hepp's title to see under whom or how he held, and so to trace the property back into the community between Ogden and wife. Ogden unquestionably claimed as sole owner, and so sold as holding under a party claiming sole ownership. In the absence of allegation and proof of facts showing that the Leland University did not honestly believe that Ogden was the real owner, the title it acquired was such, as under Arts. 3485 and 3486, C. C., opened the door to the running of prescription in its favor. There is nothing before us going to show that defendant did not honestly believe that it was purchasing the property from the real owner or impugning its good faith. (See on this subject Heirs of Ford vs. Mills and Phillips, 46 An. 331, and authorities cited.) But the plaintiffs say that prescrip-

tion could not begin to run until August, 1875, when Judge Ogden died, for the reason that under the law he was usufructuary during life of the property, and for the further reason that the community had not been settled. We see no reason why the existence of a usufructuary right in the father should have prevented the heirs from liquidating the community at once, and asserting, by petitory action, their rights of ownership in property illegally alienated by him. There was nothing forcing them to postpone action until the termination of the usufruct. The sale by the father to the defendant of the property was a renunciation by him of any claim of future usufruct upon the property sold.

The argument advanced by plaintiffs that they were without legal right to institute a petitory action for any specific property of the community until a liquidation of the community is inconsistent with their present attitude before the court. They assert that the community is even now unsettled, and yet they are before us as plaintiffs in petitory action. They had the same rights in 1870 in this respect as they have now.

But we are not now dealing with the question whether defendant could have successfully set up as an exception, that the heirs of the wife could not bring this action for a specific piece of community property until the community was liquidated. Defendant makes no such point. What it contends is that there was no legal obstacle in the way of plaintiffs placing themselves in position to have brought such an action by a forced liquidation of the community, immediately after the mother's death, had such a liquidation been a necessary legal condition precedent to the institution of such a suit; that the way to an action being open to them, they could not by voluntary inaction, indefinitely postpone the running of prescription in defendant's favor. (*Day vs. Collins*, 5 An. 589.) The legal proposition which plaintiffs contend for, that the heirs of a wife can not institute a petitory action unless and until the community between the wife and her husband has been liquidated, has been advanced a number of times before the court and passed on. The circumstances under which it has been advanced and the parties by whom it has been advanced, as affecting the decisions which have been rendered, have not been given sufficient weight to by the plaintiffs. In *Heirs of Murphy vs. Jurey & Gillis*, 39 An. 785, we said: "The heirs of a wife become vested with a title to her share of the

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community property at the moment of her death, and though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it." *Tugwell vs. Tugwell*, 32 An. 848, and *Glasscock vs. Clark*, 33 An. 584, reaffirmed. Nor in such action, petitory in its character, is the indebtedness of the community, or its financial condition when dissolved, a legitimate subject of inquiry. *Taylor Digest*, p. 503, No. 5.

The plaintiffs assign as another reason why prescription should not run the argument that when Ogden (being really only the owner of an undivided half of the property) undertook to sell the whole of the same to the defendant, he conveyed validly his undivided half to it, but the other undivided half remained the property of the heirs of the wife; that the heirs of the wife and the defendant were therefore joint owners of the property, and as between joint owners the prescription of ten years would not be applicable. Citing *Heirs of Murphy vs. Jurey & Gillis*, 39 An. 785; *Tugwell vs. Tugwell*, 32 An. 848; *Glasscock vs. Clark*, 33 An. 584; *Simon vs. Richard*, 42 An. 846; 56 Texas, 356; 21 N. E. Rep. 420; 1 S. E. Rep. 625; 14 South Rep. 734; 42 N. W. Rep. 955; 22 N. E. Rep. 529; 28 N. E. Rep. 348, 627.

The decisions cited refer to a state of facts entirely different from those in the present case, and have no applicability to the question as presented to us in this proceeding. It will be time enough to discuss what prescription runs between co-proprietors after the fact of the existence of the relation of joint owners between the parties shall have been judicially determined. Defendant repudiates the idea that the plaintiffs hold the property in joint ownership with it. That issue is the very one before the court. Defendant questions plaintiff's rights to the undivided half of the property, just as he would question the right of a person claiming the property in its entirety. Defendant, in its purchase of the property, had nothing to do with the plaintiffs. Its purchase was of the entirety of the property, and it has the right to urge the prescription of ten years conformably to the title transferred to it to its full extent. This is not a suit for a partition between joint owners, but a petitory action.

In *LeBlanc vs. Robertson*, 41 An. 1023, this court held that in a petitory action brought by parties claiming to own undivided inter-

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ests in an immovable against parties possessing and claiming to hold in indivision the whole immovable, defendants are entitled to plead the prescription of ten years, although an action for partition is only barred by thirty years; that presenting titles adverse to and exclusive of the title set up by the plaintiffs, defendants were not governed by Arts. 1804 and 1305 (Revised Civil Code) regulating prescription and possession as between co-heirs and co-owners.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

No. 12,324.

THE STATE OF LOUISIANA VS. JAMES J. SULLIVAN.

When a party was entrusted by another with property in one parish of the State to be there returned, but instead of so returning the property so received in trust, the party conceived in that parish the intention of fraudulently appropriating the same to his own use, and in furtherance of that intention took the property to another parish in the State for the purpose of there unlawfully and fraudulently selling or disposing of the same, and did there and then fraudulently dispose of the property and appropriate same to his own use, such party is legally subject to indictment for embezzlement in the parish where he receives and was entrusted with the property.

49	197
107	328
49	197
e118	554

A PPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

M. J. Cunningham, Attorney General, and *G. A. Gondran*, District Attorney, for Plaintiff, Appellee.

R. McCulloh for Defendant, Appellant.

Argued and submitted December 5, 1896.

Opinion handed down December 14, 1896.

Rehearing refused January 18, 1897.

The opinion of the court was delivered by

NICHOLLS, C. J. The indictment in this case charges that the defendant, "on the fifteenth day of September, one thousand eight

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hundred and ninety-six, with force and arms, in the parish of Ascension, and within the jurisdiction of the Twentieth Judicial District Court of the State of Louisiana, being then and there a trustee of Henry O. Maher, Jr., did then in his fiduciary capacity, fraudulently, wrongfully and feloniously use, conceal and otherwise embezzle a gold watch of the value of one hundred dollars, a gold chain of the value of forty dollars, a gold locket of the value of ten dollars, the whole valued at one hundred and fifty dollars, the lawful property of said H. O. Maher, Jr., which had been there entrusted to his care, keeping and possession by the said H. O. Maher, Jr., with the felonious intent to convert the same to his own use and benefit, and to deprive the said H. O. Maher, Jr., of his lawful property." The only matter called to our attention by counsel of defendant is contained in a bill of exceptions, in which it is recited "that on the trial of the cause the State attempted to show that the watch which accused is charged in the information with having embezzled was pledged in the city of New Orleans by accused to a pawnbroker; and that to any and all evidence of any use made in the city of New Orleans of said watch, by said accused, defendant objected on the ground that the same was inadmissible under the information which charges the accused with having wrongfully converted said watch to his own use in the parish of Ascension—that the court overruled said objection, on the ground that should the State produce evidence to show that accused had formed the intention of converting the watch to his own use in the parish of Ascension and pursuant to said intention so formed in said parish had gone to the city of New Orleans and there pawned said watch, accused could be, under the law prosecuted either in said city or in said parish; that said evidence was, therefore, admissible; that he would charge the jury that unless they found from the evidence that accused had formed the intent to convert said watch in the said parish, they must discharge the said Sullivan;" that to this ruling defendant excepted and reserved a bill of exceptions.

Appended to the bill is the following statement of the judge: "As stated in the foregoing bill of exceptions, I allowed the State to show the fact that the property alleged to have been embezzled by defendant was pawned by him in the city of New Orleans, but I stated at the time that I would charge the jury that unless the accused had wrongfully appropriated the property in Ascension.

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parish, and had conceived the idea of converting it to his own use in said parish, they could not convict him, and I did so charge the jury, and expressly stated to them that if accused had only conceived the idea of appropriating the property in the city of New Orleans, he could not be convicted in Ascension parish." The accused was found guilty by the jury and sentenced to one year's imprisonment at hard labor in the penitentiary. He appealed.

No objection appears to have been made to the indictment, nor to the charge given by the court. No plea to the jurisdiction of the court was entered. Defendant went to trial without objection. The case comes to us on an objection by defendant to the reception of evidence under the recitals of the information. Defendant's complaint is, that under the allegations of the information it was not competent for the court to allow testimony to show that the watch charged to have been embezzled was pawned in the city of New Orleans. He made no motion to strike out the evidence. (See Rice on Criminal Evidence, Vol. 3, Secs. 256 *et seq.*). He made no attempt to make use of the fact complained of, for a new trial.

In the brief filed in behalf of the defendant we understand his counsel to maintain that as the "possession" of the jewelry had been given to defendant by the owner, and his original possession was lawful—he continued to hold the same lawfully until actual conversion. That even if he conceived in the parish of Ascension the idea of disposing of the goods in the city of New Orleans, and left that parish, taking the goods with him for the purpose of there accomplishing his design, he was guilty of no crime when he crossed the parish line. That he still held them lawfully in possession, and the mere "intent to commit" did not change the character of the possession; and that when the intent to convert became coupled with the fact of conversion, then, for the first time, was there a crime committed, and that conversion took place in New Orleans.

The case comes before us with a judgment of the District Court for the parish of Ascension based upon the verdict of a jury convicting defendant of embezzlement, charged to have been committed in the parish of Ascension. Upon what particular evidence, or on what precise theory of the law the jury acted in finding the verdict, we can not say with any certainty. If the act of appropriation or disposal, by defendant, of the property took place in the city of New Orleans, as defendant intimates that it did, we only come to a

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knowledge of that fact inferentially through reference made by counsel and the court to the admission of the testimony against the reception of which he argued and still complains. We understand him to say that but for that evidence there would have been nothing before the jury to show unlawful appropriation or conversion, and that the jury would, but for this, have been forced to acquit him. Of the correctness of that proposition, we are not advised. We know nothing of what occurred between defendant and Maher in the parish of Ascension before defendant pawned the watch in New Orleans, nor do we know anything of what occurred in that parish afterward. (State vs. Foster, 8 An. 292.) We would infer from the judge's charge, followed as it was by the verdict, that matters had occurred in Ascension parish of a character such as to warrant the verdict independently of the act of pawning in New Orleans. That act may have been only offered as "evidence" and cumulative evidence of a prior embezzlement, and may have been very properly admitted to show intent.

Defendant was indicted under Section 905 of the Revised Statutes, which declares that "any servant, clerk, broker, agent, consignee, trustee, attorney, mandatory, depository, common carrier, bailee, curator, testamentary executor, administrator, tutor or any person holding any office or trust under the executive or judicial authority of this State, or in the service of any public or private corporation or company, who shall wrongfully use, dispose of, conceal or otherwise embezzle any money, bill, etc., * * * shall suffer imprisonment," etc.

The term "embezzle," used in the statute, is one which has a well recognized and accepted common meaning, as much so as the word to "burn" or to "carry away." (See Bishop's Criminal Proceedings, Section 322.)

Webster defines it as "to appropriate fraudulently to one's own use, as that entrusted to one's care; to apply to one's private use by a breach of trust as to embezzle public money." It has received frequent judicial construction. It is a broader term than larceny under our law, but is not exclusive of it, as counsel contends. (See State vs. Wolff, 34 An. 1154.)

It is not of the essence of the "commission" of the crime of embezzlement (if committed within the State), that all of the elements of the crime should be consummated in the same parish

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though the question, as to where the crime was committed affects the jurisdiction of the court in which the accused may be brought to trial.

Defendant's contention that the place of an ultimate unlawful sale or pawning of property by a person holding the same through fiduciary relations with the owner is the only test and criterion of the place where embezzlement of that property was effected, and that antecedent acts by him, in other localities, are to be taken and considered as merely acts leading up to an embezzlement there, is not, in our opinion, sound.

Though defendant does not present this case specifically as one involving the jurisdiction of the District Court of the parish of Ascension over the trial of this cause, we think it may be well to say, that if that question arose it sprung entirely from the evidence on the trial of the case, and not from the averments of the indictment or from defendant's pleadings.

We are of the opinion that if the jewelry received by the defendant and entrusted to him by H. O. Maher was received in the parish of Ascension, to be there returned, but that instead of doing so defendant conceived, in that parish, the intention of fraudulently appropriating the same to his own use, and in furtherance of that intention he took the same to the city of New Orleans for the purpose of there unlawfully and fraudulently selling or disposing of the same, and that he did there fraudulently sell and dispose of the same and appropriate the same to his own use, he was legally subject to indictment in the parish of Ascension for embezzlement. (See American and English Encyclopædia of Law, Vol. 6, *verbo* Embezzlement, 35 Ohio, page —.

For the reasons herein assigned the judgment appealed from is affirmed.

No. 12,120.

MRS. MARY BEBWICK, WIFE OF JAMES D. CAPRON, VS. A. G. FRERE,
SHERIFF, ET AL.

The certificate of the judge authorizing a married woman to borrow money and mortgage her property for her separate use and benefit shifts the burden of proof as to the character of the engagement from the creditor to the wife.

49	201
50	1045
50	1354
49	201
114	770
49	201
123	6
128	242
125	286

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The mere fact that a married woman has been authorized to borrow a fixed amount does not necessarily bind her if she subsequently undertakes to bind herself for that amount.

Where, on the face of an act of mortgage by the wife, knowledge was brought home to the mortgagee that the money about to be borrowed was intended to be used for the purposes of cultivating a plantation carried on by the husband for the benefit of the community, the wife will not be bound.

A PPEAL from the Seventeenth Judicial District Court for the Parish of St. Mary. *Allen, J.*

D. Caffery & Son for Plaintiff, Appellant:

One who takes a mortgage from a married woman, knowing that the money loaned will enure to the benefit of the husband, or with good ground to believe that it will, has no valid claim against the wife, even though the mortgage was granted under the judicial authorization provided for in Arts. 126, 127 and 128 of the Civil Code. *O. C.*, Art. 2398; *Chaffe vs. Watts*, 37 An. 333; *Gibson vs. Hitchcock*, 37 An. 209; *Barthe vs. Kasa*, 30 An. 940; *Claverie vs. Gerodias*, 30 An. 292.

The ownership of a plantation in indivision by a husband and wife, and the joint cultivation thereof by them, implies and necessitates the existence between them of a partnership, or some other contractual relation not permitted by law. *Smith vs. Wilson*, 10 An. 255; *Benton vs. Roberts*, 4 An. 216; *Valensin vs. Valensin*, 28 Fed. Rep. 599; *Vaiden vs. Hawkins*, 6 Sou. Rep. 227; *Burgess vs. Badger*, 12 West, 810; *Dame vs. Kempster*, 6 N. Eng. 93; *Bank vs. Altheimer*, 8 West, 562; *Domat*, Part 1, Book II, Tit. V, Sec. 2, Art. 1488; *Toullier*, *Droit Civil*, Book 7, Sec. 155, p. 91; *Merlin Repertoire*, Tome 6, p. 86, *verbo Indivis*.

A creditor who knows of the joint ownership and joint cultivation of the spouses is bound to know the legal status of such joint ownership and cultivation. *Ignorantia legis neminem excusat*. *O. C.*, Art. 2285.

A mortgage taken by a creditor aware of a state of facts from which the law would deduce non-liability of the wife, is not protected by the certificate granted under the Act of 1855; *a fortiori*, must such protection be denied where the wife produces direct

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evidence assailing the *bona fides* of the creditor, and showing that he regarded the husband as his debtor.

When a wife is authorized by a judge, under the Act of 1885, to mortgage her separate property for a certain sum, for a certain purpose, and for a loan of a certain character, and she thereupon executes a mortgage for a different sum, for a purpose in addition to the one recited in the certificate, and for a loan of a different character than that authorized, whoever endeavors to enforce the mortgage must prove *aliunde* that the debt enured to the separate benefit of the wife. *Conrad vs. LeBlanc*, 22 An. 123.

The certificate of the judge is authority for both the security and the contract; and if the wife is directed to mortgage her property and to pledge the crop thereon for the purpose of securing advances on a crop to be made on the property, and the pledge of the crop is disregarded, and the property alone is encumbered for the whole amount of the loan, the certificate has been violated in that there was an injurious variance between the security allowed and that given. C. C., Art. 128.

There can be no valid sale, either directly or indirectly, and either with or without a consideration, from a wife to a husband. C. C., Arts. 1790 and 2446.

Where a person avowedly interposed takes title to a wife's property, and on the same day, before the same notary and in the presence of the same witnesses, immediately sells same to her husband, taking the notes of the husband to represent the price, the confessed object of the transfer being to give an extension of time on a mortgage previously affecting the wife's property, the whole transaction must be considered as one between wife and husband, and is, therefore, null. *Parnell vs. Petrovic*, 14 An. 601; *Vicknair vs. Trosclair*, 45 An. 373; *Layman vs. Vicknair*, 47 An. 679.

Any third person is placed on his guard by records showing that the wife's property had passed from her into the immediate possession of her husband; and much more is a person who actively procured the transaction held chargeable with the equities. *Layman vs. Vicknair*, 47 An. 679.

Mortgages are not negotiable, and the equities are always pleadable against a third holder who has not been deceived into purchas-

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ing by the apparent straightness of the records. *Layman vs. Vicknair*, 47 An. 679.

One who buys without warranty gets nomore than a mere quit-claim, an equitable right, which is not bettered or strengthened by the circumstance that one who buys with such a title is a third holder. *Eastman vs. Beller*, 3 R. 253; 11 R. 441; 17 La. 403; 20 An. 250. An administrator can not, without an order of court, transfer negotiable assets belonging to the succession represented by him; still less can he divest the succession of title by a private agreement to sell, in the absence of the fixing or payment of the price and without a delivery of the thing agreed to be sold. *Nicholson vs. Chapman*, 1 An. 222; *Burbank vs. Payne*, 17 An. 15.

L. F. Suthon for *W. J. Suthon*, Defendant, Appellee.

E. Howard McCaleb for *Mrs. M. G. T. Stemple*, Guardian, Defendant, Appellee:

Where a married woman borrows money, and is properly authorized by the judge to do so under Arts. 126, 127 and 128 of the Civil Code, she is absolutely bound in the absence of proof of: (1) Fraud or marital coercion, concurred in by or known to the creditor. *Gibson vs. Hitchcock*, 37 An. 209. (2) When the loan was, to the creditor's knowledge, for the benefit of the husband or to secure his debt. 30 An. 940, 291; 31 An. 784; 26 An. 787. In the absence of such guilty knowledge, on the creditor's part, the judge's certificate is a complete protection to him. 32 An. 1103; 28 An. 232, 494.

To destroy the legal effect of the judge's certificate, "the most positive and satisfactory proof" is required. *Blake vs. Nelson*, 29 An. 249.

Evidence of the loose confession of a deceased person has little or no effect, particularly when contrary to rights shown by written evidence, or when other evidence can be procured. 10 L. 355; 6 An. 763; 2 R. 299; 7 R. 111, 146; 8 An. 277; 10 An. 279; 14 An. 274; 12 An. 401.

If the original mortgage granted by a married woman is valid and legal, a subsequent transfer to the creditor of the property mortgaged, in satisfaction of the mortgage debt, is likewise

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valid and legal, when the consideration is adequate. The interposition of a person to receive title for the creditor does not affect the validity of such a transfer. *Lester vs. Sheriff*, 46 An. 340.

The consideration is adequate when it exceeds the assessed value of the property on the assessment roll, which, after the approval of the police jury, as a board of reviewers, has a *quasi-judicial* character. *Railroad Company vs. Sheriff*, 38 An. 760.

The good faith of a money lender is to be tested by the public records alone. "No other notice can prove knowledge" as to the ownership of property. The rule applies to married women. *Boyer vs. Sheriff*, 40 An. 660; *Broussard vs. Broussard*, 45 An. 1085.

If the condition of the property is such as to invoke inquiry, then where the public records disclose no equities, in the case of married women, "an affirmative showing may be required against an attack made by the wife." If such be the case here, such affirmative showing has been made, and a valid consideration to the wife has been proven. *Layman vs. Vicknair*, 46 An. 679.

Argued and submitted May 20, 1896.

Opinion handed down June 23, 1896.

Rehearing refused January 4, 1897.

STATEMENT.

On the 4th of February, 1890, Mrs. Mary Berwick, wife of James D. Capron, aided, authorized and assisted by her husband, presented a petition to the judge of the Nineteenth Judicial District Court for the parish of St. Mary, in which she averred that she was the owner in her own right as her separate paraphernal property of the undivided half of a certain plantation in that parish, which she described. That she was administering the same for her benefit and account outside of the community between herself and her husband; that she was engaged in the cultivation and administration of same as a sugar plantation, and was in need of funds for the proper and profitable cultivation and working of the same; that she had applied to Mr. D. C. McCan, of the city of New Orleans, for funds for the pur-

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poses aforesaid, and the said D. C. McCan agreed to advance her the sum of ten thousand dollars as it might be required during the current year 1890, in order to enable her to procure the necessary supplies and pay the necessary expenses of working, cultivating, harvesting and marketing the crops of cane, corn and other produce to be grown and cultivated on said plantation; that the said D. C. McCan required from her a special mortgage on her aforesaid property, and a factor's lien and privilege on all the crops and products of the aforesaid property for the current year 1890, to secure him in his aforesaid advances not exceeding ten thousand dollars. Wherefore she prayed the said judge to authorize her to make the aforesaid loan for the purposes aforesaid, and to secure same by a special mortgage on her aforesaid property, and also a lien and privilege on all the crops and products grown and produced on same during the current year 1890. The District Judge rendered the following order upon this petition:

“ Having examined Mrs. Mary D. Capron separate and apart from her husband, James D. Capron, and being satisfied from such examination that the sum of money which she contemplates borrowing from D. C. McCan, as stated in the foregoing petition, is for her own use and benefit, and that of her separate estate, and not for the benefit of her said husband, or the payment of his debts, nor those of the community heretofore existing between said parties, I hereby authorize the said Mrs. Mary D. Capron to borrow the said sum of ten thousand dollars from the said D. C. McCan, and to secure the same by a special mortgage on her paraphernal property, and also by a lien, privilege and pledge on the crops to be grown on her said property during the year 1890. Granted in chambers, this 4th day of February, 1890.”

On the 7th of February, 1890, a notarial act was executed before Andrew Hero, notary, to which James D. Capron and his wife and D. C. McCan were parties. In this act Mrs. Capron appeared as acting under the authority of her husband and of the certificate or order of the District Judge just copied. The act recited that she acknowledged herself indebted to McCan in the sum of ten thousand dollars, borrowed money had of him under and by virtue of the said certificate; that in settlement and as evidence of said indebtedness, she had furnished her two promissory notes of five thousand dollars each, drawn by her to her own order and by her endorsed, counter-

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signed by her husband, payable one and two years after date, with interest at the rate of eight per cent. per annum from maturity until paid; that interest for the first year had been paid in advance, and that the interest for the second year was represented by a promissory note also then executed by Mrs. Capron of like tenor for four hundred dollars, payable two years after date.

That in order to secure payment of the said notes Mrs. Capron specially mortgaged in favor of McCan her undivided half interest in the property mentioned, cultivated as a sugar plantation. That in order to more fully secure the punctual payment of the said notes, James D. Capron specially mortgaged his undivided half of said property in favor of McCan—to the end and effect that the plantation and appurtenances in its entirety should be mortgaged as security for the payment of the notes. It was expressly declared in the act that it was agreed and understood by and between the parties to the act that the said mortgagee should have the exclusive right to apply the net proceeds of all products shipped and all payments of money made to him to the payment of any indebtedness which might (may) be then due or which might (may) hereafter become due to said mortgagee by said mortgagors, whether upon an open account or to the debt secured and intended to be secured by the act, according to the said mortgagee's view of the exigency of the case; that such application might (may) be made at such times and in such manner as said mortgagee might (may) elect; that no application of such proceeds of sales or money to the payment of any debt on open account which might be due to the said mortgagee by the said mortgagors should impair, lessen or prejudice the indebtedness evidenced by the notes and secured by the mortgage, and that said mortgagee should have the full and undisputed right to impute payment as he might determine to whatsoever debt might (may) be due him by said mortgagors. Production of the certificate of mortgages in the parish of St. Mary was waived. The certificate or order of the District Judge was annexed to the act.

On the 13th of April, 1893, by act before John J. Ward, notary public, James Capron sold his undivided half of the property mortgaged to Charles J. McMurdo in consideration of the price of nine thousand one hundred and twenty-four dollars. The act of sale recited that the purchaser was the holder and owner of four promissory notes, for the sum of two thousand dollars each, drawn by

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Capron to his own order and by himself endorsed, bearing interest at the rate of eight per cent. per annum from January 1, 1890, until paid, said notes amounting, at the date of the sale, in principal and interest, to the sum of nine thousand one hundred and twenty-four dollars, and being the notes given by Capron to his vendor, Mrs. Allen, in payment of the property conveyed. That their payment was secured by special mortgage on the property sold, with vendor's privilege, and that the vendor had agreed to accept and receive said notes in settlement of said purchase price. The act declared that in full settlement of the purchase price the purchaser had surrendered and delivered the four aforesaid notes to the vendor, who acknowledged receipt of the same, declaring himself therewith fully satisfied and paid and granted the purchaser a full acquittance and discharge for the aforesaid price.

The notes having been produced and canceled, authorization was given to the recorder to cancel and erase the inscription of the mortgage securing the same.

On the same day, before the same notary, Mrs. James D. Capron sold her undivided half in the same property to Charles J. McMurdo for the price of ten thousand nine hundred and fifty-five dollars. The act recited that the purchaser was the holder and owner of two notes, of five thousand dollars each, drawn by Mrs. Capron to her own order and by her endorsed, countersigned by her husband, which notes, in principal and interest, at the date of sale, amounted to said sum of ten thousand nine hundred and fifty-five dollars; that said notes were those secured by the special mortgage on the property sold in favor of D. C. McCan by the act of February 17, 1890, before Hero, notary, and that the vendor had agreed to accept and receive said notes in settlement of the purchase price. The parties declared that said price had been settled and liquidated by the purchaser's surrendering and delivering to the vendor the said notes, "they having been canceled in the presence of the notary, the holder acknowledging payment of the same and granting Mrs. Capron full acquittance and discharge therefor." The notes having been canceled, authorization was given to the recorder to erase the inscription on the mortgage books of the mortgage securing the same.

On the same day the same notary, Charles J. McMurdo, sold the property in its entirety to James D. Capron (the act reciting that it

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was the same property which the vendor had acquired that day from the purchaser Capron and from his wife by two acts passed before John J. Ward, notary) for the price of twenty thousand dollars, payable two thousand dollars in cash, three thousand payable in one year, four thousand payable in two years, five thousand payable in three years, and six thousand payable in four years, with interest on the entire credit portion payable annually; the credit portion being represented by promissory notes executed by Capron to his own order and by himself endorsed, secured by special mortgage on the property sold. The interest portion of the purchase price was represented by notes separate and distinct from those for the principal amount, and notes being also secured by special mortgage on the property sold. One of the interest notes was for the sum of fourteen hundred and forty dollars. The notes were all delivered to McMurdo.

On the 28d of June, 1894, by act before Ward, notary, Harry H. Hall, as executor of D. O. McCan, transferred with their accessory rights but without warranty or recourse back to Walter J. Suthon two of the notes executed by James D. Capron as representing the credit portion of the price of the sale made to him by McMurdo, with the agreement that the rights of Suthon as holder of the same would be subordinate to those of McCan as holder of the other notes.

Suthon, as holder of these two notes, having seized under an order of sale the entire property, was met by an injunction taken out by Mrs. Capron, and we are called on to pass upon the issues raised by the parties in that injunction.

There was judgment for defendants, and plaintiffs appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. It is claimed on behalf of Suthon and the executor of McCan that Mrs. James D. Capron became indebted to McCan in the sum of ten thousand dollars and interest through a loan made to her on the seventh day of February, 1890, on the faith of the certificate or order of the District Judge of the court of her residence, authorizing her to contract said loan, and that said loan was legally secured under the same authorization by special mortgage on her undivided half of the plantation owned jointly between herself and husband, and cultivated as a sugar plantation; that she legally sold

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her interest to McCan through McMurdo (acting on his behalf) in payment of her indebtedness; that her husband having sold his undivided half also to McMurdo (for McCan) the latter then becoming the owner of the entire property, sold the same to plaintiff's husband, the price being secured by mortgage; that said sale was legal, and that plaintiff, through her own sale to McCan, divested herself of all interest in the premises; that if the sale should be set aside McCan should be reinstated in his position, *quoad* Mrs. Capron and the property to the position which he occupied prior to her sale.

The property in question at the time of the loan made by McCan was as to one undivided half of the paraphernal property of the wife of James D. Capron. The other undivided half belonged to the husband, he having acquired it from his wife's sister. At the time of the loan the husband's half was struck by a special mortgage and vendor's privilege securing notes given by the purchaser to his vendor. The property had been cultivated for some years as a sugar plantation, and the wife had for several years, under the authorization of the judge, mortgaged her undivided half to different factors to assist in carrying on the place.

On February 7, 1890, D. C. McCan made the loan which has given rise to this litigation. On the face of the papers McCan appears to have loaned Mrs. Capron ten thousand dollars, for which he executed notes and secured the same by special mortgage on her undivided half of the property. On the face of the papers James D. Capron secured the whole amount by mortgage on his half.

It is urged that McCan is protected by the authorization of the judge to the wife from the attack she makes in this case.

The mere fact that a married woman has been authorized by the judge to contract a debt of ten thousand dollars does not necessarily conclusively bind her if she subsequently undertakes to bind herself for that amount. The certificate of the judge shifts the burden of proof as to the character of the engagement. An examination of the act of mortgage between McCan, James D. Capron and Mrs. Capron satisfies us that the act does not truly disclose the relations of the parties to it. We are of the opinion that on its face, knowledge was brought home to McCan that Capron and wife owned the plantation jointly in equal proportions; that the money about to be borrowed was intended to be used for the purpose of cultivating the plantation that year; that the lender knew that the

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husband was really carrying on the whole place for and on behalf of the community. The husband's half at that time, as we have said, was encumbered by a special mortgage. It was important that whatever advances should be made should, if possible, be secured to their full extent by mortgage. It was evidently supposed that under and through the wife's authorization the lender would be protected on her half of the property to the full amount which she was authorized to borrow, but if not, then by making the husband secure it in its entirety by a second mortgage on his own behalf, McCan would still occupy a safe position. Matters were made to take that shape, but we think that the act bears intrinsic evidence that McCan was not dealing with James D. Capron really as a surety; that he was dealing with the husband as a principal, and that she was really mortgaging her property for her husband's debts. (*Moore vs. Stancel*, 38 An. 824.) Defendants say that McCan did not occupy the position of factor toward James D. Capron; that he was simply an "out and out" lender of money to Mrs. Capron, and that the mortgage was a "flat" mortgage.

If this be true what means that portion of the act in which it is declared that "it was expressly agreed and understood that McCan should have the exclusive right to apply the net proceeds of sale of all products shipped and all payments made to him to the payment of any indebtedness which may be due now, or which may hereafter become due to him by said 'mortgagors,' whether upon an 'open account' or to the debt secured and *intended to be secured* by these presents according to his view of the case; that such application might be made at such times and in such manner as he might elect; that no application of such proceeds of sales or money to the payment of an indebtedness on an open account which may at any time be due to him by the said 'mortgagors' shall impair, lessen or prejudice the indebtedness evidenced by notes and secured or *intended to be secured* by this instrument or the security herein and hereby provided for, and that said mortgagee shall have the full and undisputed right to impute payment as he may determine to whatsoever debt may be due by said 'mortgagors.'" What "debts made by open account," what "debts due by mortgagors," are here referred to? Certainly not any due BY HER.

It is very true that a husband may become a surety for his wife; (it has been so held), but we think the term of the mortgage act point

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unmistakably to the fact that the form in which this act was drawn was resorted to simply as a means to enable the lender to get secured on the wife's property for debts of her husband. On the face of the papers the crop (*the means by which the District Court contemplated that any liability to be incurred under his certificate was to be paid*) was expressly authorized to be taken from her and applied to her husband's debts, either upon open account or otherwise, leaving her property utterly without protection.

What effect did the acts between McMurdo and her husband and between McMurdo and herself have upon the situation? It is conceded that McMurdo and McCan are to be taken and considered as one and the same person.

We think that the two acts of sale (those to McMurdo and that of McMurdo to Capron, the husband) are to be read together and as forming one continuous transaction. Were the acts of sale from Mrs. Capron to McMurdo, and from McMurdo to James D. Capron, intended really as sales, or were they merely resorted to in order to place the matter in more satisfactory form than they had been in before? What was the object and what the motive of these acts, and what did they rest on? At that time McCan held the notes secured by special mortgage and vendor's privilege on Capron's half of the property. It was thought best that the property should be made to stand in its entirety in the name of Capron, the husband, and that the indebtedness should appear what it really was, an indebtedness due by himself, but the apparent mortgage to McCan, indebtedness of the wife was made use of as an instrumentality by which to shift ownership from herself to her husband and mask the character of the wife's connection with the debt.

We are of the opinion that the sale from Mrs. Capron to McMurdo can not stand, there being no legal consideration for the same, and that sale being the basis of the sale to Capron from McMurdo of Mrs. Capron's half of the property, the sale of that undivided half to Capron falls also.

We do not think that the plaintiff, Walter J. Suthon, occupies a better position than does the succession of McCan. We think his knowledge of the situation (although he may have drawn erroneous conclusions from it) effectually prevents his pleading that the equities have been cut off in his favor.

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We are of the opinion that the judgment appealed from is erroneous.

It is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed; and it is now ordered, adjudged and decreed that Mrs. Mary Berwick, wife of James D. Capron, be and she is recognized and declared to be the owner of the undivided half of the plantation seized herein and described in the pleadings, and she is restored to the possession and enjoyment of the same, free from the encumbrances placed upon it by her husband, James D. Capron, in favor of D. C. McCan or Charles McMurdo, the said mortgage being declared to be null, void and of no effect as against said undivided half of said property.

It is also ordered, adjudged and decreed that the sale of the undivided half of said property, made on the 13th of April, 1893, by act before John J. Ward, notary public, by Mrs. Mary Berwick, wife of James D. Capron, to Charles J. McMurdo, and the sale made by Charles J. McMurdo on the same day, before the same notary, to James D. Capron, of the undivided half of said property herein adjudged to be the property of said Mrs. Mary Berwick, wife of James D. Capron, be and the same are hereby decreed null, void and of no effect.

It is further ordered that the injunction herein issued be and the same is reinstated and the same is now perpetuated.

Rehearing refused January 4, 1897.

CONCURRING OPINION.

WATKINS, J.—The plaintiff, a married woman under coverture, enjoins the seizure and sale of one undivided half interest in the Berwick Home plantation in the parish of St. Mary, of which she claims the ownership in her own paraphernal right, by inheritance from her father, on the averment that her title is attempted to be divested by means of certain fraudulent and illegal proceedings in the foreclosure of a mortgage and sale thereof, by Walter J. Suthon, plaintiff in the suit of Walter J. Suthon vs. James D. Capron, her husband.

The two grounds of nullity on which plaintiff relies are, *first*, that

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the act of mortgage to which her signature was affixed, bearing date February 7, 1890, purporting to secure a loan of ten thousand dollars in money by D. C. McCan, was, in reality, a security for the personal indebtedness of her husband, then existing, and of the matrimonial community between herself and husband, to the extent of at least three thousand dollars, and for the security of the further and remaining balance of seven thousand dollars which was contracted and agreed to be thereafter employed by her husband, in the cultivation of a crop of sugar upon said plantation and land under his administration and control—said husband being the owner of the other undivided half interest—in contravention of Art. 2398 of the Revised Civil Code; *second*, that the acts of sale from her to Charles J. McMurdo, a party interposed for D. C. McCan, on the 13th of April, 1893, in purported liquidation and settlement of the aforesaid mortgage note of ten thousand dollars, and that of same date, by said McMurdo representing McCan, to her husband, James D. Capron, upon terms of credit, truly evidence an attempted sale from herself to her husband, in violation of the express prohibition of Art. 2446 of the Revised Civil Code—and that it was accomplished through the representations and at the request of the defendants, D. C. McCan and Walter J. Suthon, for the express purpose of giving to the original transaction a new shape, and relieving it of apparently illegal features, with the definite object of making the new notes a better security than the old ones were.

In support of said grounds of nullity, she avers that she was induced to sign said acts, through the exercise of marital influence on the part of her husband, believing them to be for his interest and advantage.

On the part of the defendants, the response seems to be: *First*, a denial, that, in point of fact, the ten thousand dollar notes were given for the purposes stated by the plaintiff, coupled with the averment that it was for money loaned to her; *second*, that if said note was really given for the purpose stated, same was not to the knowledge, or with the consent of McCan, and that she having availed herself of the certificate of the judge authorizing her to borrow money, on the faith of which he acted in making the loan, has placed upon her the burden of making proof of her allegations; and *third*, that Suthon actually and really acquired the said notes on which the executory proceedings are based before their maturity, and is

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protected thereby against secret equities, or latent ambiguities between the original parties.

On this statement, the first piece of evidence to be analyzed is the act of mortgage and the accompanying certificate of the judge; and therefrom we find the following facts:

The certificate of the judge is prefaced by a petition on the part of the plaintiff, as a proposed mortgagor, from which we make the following extracts, viz.:

That she is the owner in her own right of an "undivided half of that certain tract of land, or sugar plantation, known as the Berwick Home place," and that "she is administering the same for her benefit and account, outside of the community between her and her husband; and that she is engaged in the cultivation and administration of same as a sugar plantation, and in need of funds for the proper and profitable cultivation and working same. She represents that she has applied to Mr. ———, of the city of New Orleans, for funds for the purposes aforesaid, and the said ——— has agreed to advance her the sum of ten thousand dollars, as it may be required during this current year 1890, in order to procure the necessary supplies and pay the necessary expenses of working, cultivating, harvesting and marketing the crops of cane, corn and other products to be grown and cultivated on said plantation. She says that ——— requires of her a special mortgage on her aforesaid property, and a factor's lien and privilege on all the crops and products of the aforesaid property this current year 1890, to secure him in the aforesaid advances, not exceeding ten thousand dollars."

Wherefore she prays for the authorization of the judge for the purposes aforesaid—that is, to borrow ten thousand dollars for her own individual use in the cultivation and harvesting of a crop of sugar on her paraphernal property, during the year 1890, "as it may be required;" the aforesaid loan to be secured "by a special mortgage on her aforesaid property, and also a lien and privilege on all the crops and products grown or produced thereon this current year 1890."

This petition is signed by

"MARY B. CAPRON."

"To authorize my wife.

"J. D. CAPRON."

To this is appended the Judge's certificate of authorization, viz.:

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" Having examined Mary D. Capron separate and apart from her husband, James D. Capron, and being satisfied from such examination that the sum of money which she contemplates borrowing from D. C. McCan, as stated in the foregoing petition, is for her own use and benefit, and that of her separate estate, and not for the benefit of her said husband, or the payment of his debts, nor those of the community heretofore existing between the parties, I hereby authorize the said Mrs. Mary D. Capron to borrow the said sum of ten thousand dollars from the said D. C. McCan, and to secure the same by special mortgage on her paraphernal property, and, also, a lien, privilege and pledge on the crops to be grown on her said property during the year 1890.

" Granted in chambers this 4th day of February, 1890.

(Signed)

" A. C. ALLEN,

" *Judge of the 19th Jud'l. Dist.*"

This certificate discloses that D. C. McCan was the person from whom Mrs. Capron contemplated obtaining the loan, and, consequently, his name should be read into the blanks left in the foregoing petition.

The foregoing certificate of examination and authorization exactly conform to the provisions of Revised Civil Code 127 and 128, and the latter declares that such "certificate, on presentation to the notary, shall be his authority for drawing an act of mortgage, or other act which may be required for the security of the debt contracted, and shall be annexed to the act, and when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all courts of this State, and have the same effect as if made by a *femme sole*."

But the validity of the judge's certificate depends upon its conformity to the provisions of Art. 126, which declare that a married woman, "with the sanction of the judge, may borrow money or contract debts *for her separate benefit and advantage*, and to secure the same, grant mortgages or other securities affecting her separate estate, paraphernal or dotal;" and with those of Art. 127, which declare that "in carrying out the power to borrow money or contract debts, the wife *in order to bind herself*, or her paraphernal or dotal property, must * * * be examined at chambers by the judge * * * separate and apart from her husband

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touching the objects for which the money is to be borrowed or debt contracted, and if he shall ascertain either one or the other *are for her husband's debts, for his separate benefit or advantage, or for the benefit of his separate estate or of the community*, the said judge shall not give his sanction authorizing the wife to perform the acts, or incur the liabilities set forth in Art. 126."

As these articles constitute the measure of the *judge's authority and power* in granting the certificate, and the *sole authority of the notary for drawing the act of mortgage security*, the provisions thereof must be strictly pursued, on pain of nullity.

Examining the contemporaneous act of mortgage which was executed before Andrew Hero, notary, on the 7th of February, 1890, we find the following pertinent provisions viz. :

That Mrs. Mary Berwick, wife of James D. Capron, declared herself to be indebted to David C. McCan, "in the sum of ten thousand dollars borrowed money," and in settlement thereof she has executed and delivered to him her two promissory notes of five thousand dollars each, drawn to her own order and endorsed and countersigned by her husband, and payable at one and two years after date.

That in order to secure the payment of said notes, she mortgages and hypothecates unto and in favor of D. C. McCan, her aforesaid half interest in the aforesaid sugar plantation.

That in order to more fully secure the aforesaid notes, her husband, J. D. Capron, intervened in said act, and consented and agreed to mortgage and hypothecate his undivided one-half of said plantation and land, to the end and effect that the *whole* of said plantation should become mortgaged and hypothecated as security for the aforesaid loan of ten thousand dollars by McCan to his wife.

And said act contains the further stipulation, viz. :

"And it is expressly agreed and understood, by and between the parties hereto, that the said mortgagee shall have the *exclusive right* to apply the net proceeds of sale of all products shipped, and all payments of money made to him, to the payment of any indebtedness which may be due now, or which may hereafter become due to said mortgagee by said mortgagors, whether upon an open account or to the debt secured and intended to be secured by these presents, according to said mortgagee's view of the exigency of the case; that such application may be made at such times and in such manner as said mortgagee may elect; that no application of such proceeds of sale or money, to the pay-

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ment of *any debt or open account which may at any time be due to the said mortgagee by said mortgagors shall impair, lessen or prejudice the indebtedness evidenced by said notes, and secured or intended to be secured by this instrument, or the security herein and hereby provided therefor; and that said mortgagee shall have the full and undisputed right to impute payment as he may determine to whatever debt may be due him by said mortgagors.*"

The act contains a waiver of the production of a mortgage certificate, and same is signed by Mrs. Capron and her husband and D. O. McCan, in the presence of the notary and witnesses.

The conspicuous features of this act are that it secures the payment of two notes of five thousand dollars each for *borrowed money, falling due at the expiration of one and two years after the date of the act, without making any mention of the objects and purposes of the loan, or of the fact that same was for the use and benefit of her separate paraphernal property, or that same was intended for use in the cultivation of a crop of cane on her separate property under her administration, as expressed in the judge's certificate.*

And while it contains no pledge, lien or other security upon the crops of Mrs. Capron as mortgagor, as contemplated by the judge's certificate, it declares, with elaboration and especial care, that McCan, as mortgagee, shall have the *exclusive right to apply the net proceeds of the sale of all products shipped and of all payments of money made to him, to the payment of any indebtedness to said mortgagee by said mortgagors.* Or, in other words, it gave to McCan the exclusive right to impute the *entire proceeds of all crops* produced upon the plaintiff's undivided interest in the lands jointly owned by both of the mortgagors, Mr. and Mrs. Capron, to *any debt of either of them, secured or unsecured, and to likewise impute all payments of money made by either of them.*

It is manifest that the immediate effect of that stipulation was to enable the mortgagor to *absorb the crops and money of the wife in the liquidation and payment of the unsecured indebtedness of the husband; whereas it was, in the contemplation of the wife in presenting her petition, and of the judge in signing the certificate, that the money was borrowed for the purpose of producing a crop which should be pledged exclusively for the reimbursement of the loan, and secure the release of the mortgage given upon her paraphernal property as security therefor.*

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It is of this stipulation of the act of mortgage that the plaintiff urges especial complaint, and it is for this that she claims that the judge's certificate of authorization constitutes no protection, but on the contrary shifts the burden of proof upon the mortgagor, to establish that the money inured to the benefit of her separate property, and was not employed in the payment of the debts of the husband or the community. And, indeed, it seems quite apparent that the property jointly owned by husband and wife in indivision, and, no doubt, jointly administered, being thus bound up and its revenues placed beyond the plaintiff's control, and at the exclusive option of the joint creditor of both husband and wife, would speedily result in the sacrifice of the latter's interest, for the very potent reason that the act to which she was thus made a party rendered her, by its plain provisions, utterly powerless to disencumber it of the mortgage.

Passing, however, from the recitals of the acts which operate full notice to the parties and to all the world, to the pleadings and evidence taken at the trial, we find the following state of facts applicable to the original transaction:

The averments of the plaintiff's petition are, that the "whole of the said plantation was cultivated by her husband for his own individual account, or for that of the community existing between them, and for no advantage or benefit of hers or of her paraphernal estate. That the planting operations of her said husband were unprofitable for the year 1889, and resulted in a loss to him of three thousand dollars, which sum was wholly due by her said husband, and not in any way by her. That, finding himself in debt, and in need of supplies for making his crop for the year 1890, her said husband applied to David McCan * * * for a loan of eighteen thousand dollars, of which ten thousand dollars was for the purpose of liquidating and settling said debt, and of cultivating on his own account the above described plantation, for which purpose said McCan well understood and knew said sum to be borrowed; * * * and that the said McCan knew that said sum was borrowed and used by her said husband on his own account, and that it was not borrowed or used for her account or that of her paraphernal property.

"That to secure said loan she was required by her said husband to sign in favor of said McCan a mortgage on her said property for ten thousand dollars, which mortgage was passed before Andrew Hero, notary public, on the 7th of February, 1890."

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Petitioner further represents that said act was signed by her against her wishes, and solely because of the inducements of her said husband, and of the exercise of his marital influence and coercion; and that "in order to give an appearance of legality to said mortgage she was required by her said husband to obtain from the District Judge the certificate provided in Arts. 127, 128 and 129 of the Civil Code," etc.

"That said certificate directed that (her) property be mortgaged, not as a sole security for said sum of ten thousand dollars, but as partial security therefor, as, in addition to the mortgage on (her) said property she was directed to secure said sum by giving a lien, pledge and privilege on the crop to be grown on said plantation, so that the crop, as well as the real estate should be held for the payment of the said loan. That said crop was an important element of said security, as it was known to the judge, and all parties interested, that same would be valuable and would sell for enough to pay the said loan. That the terms of said certificate were not complied with, (she) not having been authorized in said certificate to mortgage her property alone, but was only authorized to grant a double security of mortgage and pledge upon the crop, so that the whole burden of the debt should not fall upon the said real estate; and the property having been mortgaged and no pledge retained upon the crop, her property became liable for the whole of said sum, whereas it was the plain intention of the judge that the crop should be answerable for the bulk, and perhaps the whole of said sum," etc.

Recurring to the aforesaid recitals and express stipulations of the act of mortgage, just the reverse of the judge's authorization appears; for not only was there no pledge of the crops stipulated therein, but, on the contrary, it contained the stipulation that the creditor and mortgagee should have the exclusive right to apply *any* proceeds of crops realized to *any* debt of either mortgagor, at his pleasure, thus unduly exposing and burthening the plaintiff's interest in the real estate, *exactly opposite* to the judge's intention, as plainly expressed in his certificate.

The answer of H. H. Hall, executor of David McCan, is a substantial verification of the recitals of the judge's certificate and an affirmation of the truthfulness of the act of mortgage.

That of J. D. Capron is that he acquired by purchase from Mrs. Louisa Allen, a sister of his wife, one undivided one-half interest in

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the Maryland plantation which is herein involved, on the 13th of November, 1889, for the price of eight thousand dollars on terms of credit, exclusively, for which he executed four notes, secured by mortgage and vendcr's lien, payable at future dates specified.

That, finding himself unable to pay same at maturity, "he applied to David C. McCan * * * for the sum of eighteen thousand dollars, of which eight thousand dollars was necessary for the satisfaction or purchase of said Allen notes; three thousand dollars of which was for the payment of his commission merchant of a deficit in his account * * * for the running expenses of (his) cultivation of said plantation for the year 1889; and seven thousand dollars of which was for respondent's cultivation of his crop on the said plantation for the year 1890, for which purpose (he) stated to McCan the said sum was to be used." That the said McCan agreed to loan (him) the amount required, and to purchase the Allen notes, and did so. "That to secure the ten thousand dollars remaining after the purchase of the Allen notes (his) wife executed in favor of McCan a mortgage passed before A. Hero, notary public, on February 7, 1890. That at the maturity of said ten thousand dollars notes * * * (he) was ready and able to pay same with the proceeds of the crop grown on the said plantation for the year 1890, but the said McCan consenting to their continuance for another year, they were not paid by him. That his planting operations for the year 1891 and 1892 being unsuccessful, and he being again in need of money for the cultivation of the crops on said plantation, he applied to (the plaintiff) for a loan which * * * said Suthon refused to make, for the reason that he (Suthon) considered the McCan mortgage against his (Capron's) wife, or any other mortgage from her *under the condition of joint ownership* of the said plantation in (him) and his wife, and the necessary management thereof by him, as null and void. But that said Suthon suggested that title to the whole property and plantation be put in respondent, and this was done by the transfer of April 13, 1893, before Ward, notary public; and that (he) being unable to obtain money from any other person was compelled to accede to said arrangement, which having been consummated, was satisfactory to said Suthon, who agreed to make advances, and did so."

It is admitted on the part of the defendants that the undivided half interest in the property which the plaintiff owned was her sepa-

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rate paraphernal property which she acquired by inheritance from her deceased father; and Mrs. Louise Allen acquired the remaining half interest therein and subsequently sold same to J. D. Capron, as alleged in his answer.

The overseer on the plantation in controversy was introduced as a witness for the plaintiff, and his statement is, that he managed and superintended same for and during the years 1889 and 1890. That he was employed by J. D. Capron, who directed and controlled the whole plantation, disposed of the crops, employed the laborers, paid all plantation expenses, and his wages. That during the term of his employment, he received orders from no one else than Mr. J. D. Capron, and knew of no one else who set up any claim or pretension to the management or control thereof. That prior to his employment on the place he had lived in the neighborhood, and had been familiar with the place and knew when Mr. Capron went on the place and helped him to operate it for two or three weeks thereafter. He states that he is familiar with the transactions between Mr. Capron and D. C. McCan, and that subsequent thereto the former paid him his wages as overseer; and that soon after the mortgage was given to McCan, he received the sum of five hundred dollars which he (witness) had loaned him (Capron) and two months' salary. That the whole plantation "was cultivated as an entirety," and that whatever moneys were expended were for the whole plantation; and that neither the plaintiff nor her husband had any money except what they had borrowed to run the plantation with. That plaintiff had nothing whatever to do with the management of the plantation in 1890.

Another witness, who resides on the plantation adjoining that in dispute, corroborates the statement of the overseer, but from his observation only; and another witness, who states that he was acquainted with the place during the years 1889 and 1890, says Mr. Capron was superintending the plantation exclusively—that is the whole place—and never knew of the plaintiff exercising any control whatever; either personally or through her husband as agent for her.

As a witness the plaintiff states that the entire sum of ten thousand dollars that was borrowed from D. C. McCan "went for her husband's business." That she never handled any part of that money. That her husband had the exclusive management and control of the

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plantation, and that she had nothing whatever to do with it, directly or indirectly.

Her statement in respect to the loan of ten thousand dollars by McCan is as follows, viz.:

"I gave the mortgage because my husband told me that it was absolutely necessary to his business, and, after discussing the matter for weeks, he told me that if I insisted on resisting that he would have to give up the plantation business and leave the plantation, and I knew that if he went into any other business that I would have to roam around everywhere with my little children, and for that reason, after thinking the matter over for a long time, I concluded to give the mortgage."

She states that when the checks were drawn by Mr. McCan she endorsed them and turned them over to her husband, and that he used the money for plantation debts and expenses.

After having had exhibited to her the act of mortgage executed by her in favor of Thomas A. Laws & Co. before J. W. Lyman, notary, on the 20th of February, 1889, she says that the purpose of same was for her husband's business—to secure "advances on the plantation," and that the money which was borrowed from Mr. McCan was partly for the purpose of paying that indebtedness.

It is striking that throughout the entire course of the plaintiff's testimony it is nowhere stated that there was ever *any* negotiations or interviews between herself and D. C. McCan, or any person representing him, with regard to borrowing of him ten thousand dollars, or any other sum, during the year 1890; or with regard to the execution of a ten thousand dollar mortgage in his favor on his property.

Louis P. DeBoutte, as a witness, states that he "accompanied Mr. Capron at about the date (of the act of mortgage) to the office of Mr. McCan, for the purpose of introducing him to Mr. McCan. That he then informed Mr. McCan that Mr. Capron was an applicant for a loan and would himself explain matters therewith connected. That he simply heard Mr. Capron apply for a loan of eighteen thousand dollars, to be secured by a mortgage upon a sugar plantation owned by himself and wife. That Mr. Capron himself asked for a loan and offered the place owned by himself and wife as security. * * * That he does not recollect Mr. Capron telling Mr. McCan that he was managing the place for either himself or his wife, and do not think the question was asked whilst he was within hearing. Mr. McCan

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asked Mr. Capron who owned the plantation (and) he replied that he and wife owned it. Mr. McCan asked what, if any, debts existed against the plantation, and Mr. Capron replied there was a debt of eight thousand dollars recorded against it. Mr. McCan asked if the place owed other debts, and Capron replied about three thousand dollars due to his commission merchant. Mr. McCan then replied that he would investigate, and if everything was all right he thought he would make the loan.

*"Mr. Capron told Mr. McCan that a debt of three thousand dollars was to be paid out of the loan to his commission merchant. * * * Mr. McCan was informed that the balance of the money was to be used in cultivating the crop."*

The statement of Andrew Hero, Jr., the notary before whom the plaintiff executed the ten thousand dollar mortgage in favor of McCan, is, that "in the beginning of February, 1890, J. D. Capron called at his office and stated that he had heard that he attended to making loans for D. C. McCan and desired to know if he could secure a loan for twenty thousand dollars on his or the Berwick plantation. That he told him that he preferred that parties should deal personally with Mr. McCan, and to call on him. The next day, or a few days afterward, Capron and McCan called at his office and the subject of the mortgage was discussed *before and with him*. McCan looked to him to protect his interests in the execution of the mortgage, and if he was not satisfied he could decline them. That he learned that one-half of the plantation belonged to J. D. Capron, whereon there was an existing vendor's mortgage of eight thousand dollars, and that the other half of the place belonged to his wife, Mary Capron, which was subject to a mortgage of four thousand dollars (and) that the holders were pressing for payment."

That he then advised, and McCan accepted, the plan as it was consummated.

He states, however, that "Mr. Capron demurred to the reduction (to eighteen thousand dollars), insisting that full twenty thousand was needed, but McCan would not yield and finally Capron agreed to the terms that McCan insisted upon. Afterward the necessary papers were produced, and the transaction was consummated in the words above stated."

He states that nothing was said at the time the act of mortgage was prepared about the pledge of the crop. That "*acting as Mr.*

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McCan's adviser and notary, he considered that the certificate of the judge to borrow the stated amount of ten thousand dollars, and secure its payment by mortgage, was all that was necessary, and the acceptance of less security, by only mortgaging the real estate, did not impair the force of the certificate nor the validity of the mortgage to be executed. That he said nothing to Mr. McCan or Capron *of such omission of such pledge of crop, as McCan left it to his option as to the papers presented to him, and the proper execution of his mortgages*; and neither he, McCan, nor J. D. Capron, nor his wife, Mary Capron, said that any crops were to be pledged as security. That if such pledge had been suggested he would have recollected it and put it in the mortgage, but it was an outright, flat loan of ten thousand dollars on Mrs. Capron's half of the plantation, additionally secured by her husband mortgaging his half of the plantation, and no reference or conversation had with or before me as to any pledge to be made or given of the crop of the plantation by either McCan or Capron."

It thus appears that this witness confesses that in this entire transaction he not only acted as officiating notary but assumed the role of sponsor and adviser of McCan; and, with the certificate of the judge before him containing the plain recital that the money the plaintiff proposed borrowing from his client, McCan, was "for her own use and the benefit of her separate estate, and not for the benefit of her said husband, or the payment of his debts, nor those of the community, and that same was to be secured by a mortgage on her paraphernal property, and also a lien, privilege and pledge of the crops to be grown on her said property during the year 1890," he deliberately advised McCan to pursue an exactly opposite course, and McCan followed his advice, and acted as he directed him to do.

Not only so, but he professes that nothing was said by either of the parties in his presence with regard to the act containing the stipulation of a pledge upon the crops to be thereafter grown upon the property, whereas he had before him the petition of the plaintiff, on the faith of which the judge had granted the certificate, and which petition contains the recital, that she desires to borrow ten thousand dollars for the cultivation and working of her plantation, in order to procure necessary supplies and to pay the necessary expenses of its cultivation; and which further recites that McCan "required of her a special mortgage on her aforesaid property, and a factor's lien and privilege on all the crops

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and products of the aforesaid property this current year (1890),” and that she prays for the judge’s authorization to that effect.

And this witness further states that he “understood that part of (the money loaned) was to be used in settlement, or payment of the mortgage of four thousand dollars *that Mrs. Mary Capron owed on her half of the plantation*; and I only came to know this because this mortgage was specified in the certificate of mortgages produced for annexation to the act. As to what use the balance was put, I know not.”

It is of importance to ascertain the contents and purport of the mortgage which the plaintiff had executed in favor of James H. Laws & Co., on the 20th of February, 1889, which was recorded against her property, and mention of which was made in the mortgage certificate to which the witness, Hero, refers.

The pertinent stipulations of same are as follows, to-wit: “And the said James D. Capron is the lessee of the other undivided one-half of said plantation, which said plantation the said appearers are working and cultivating during the current year, for the purpose of growing and gathering thereon crops of corn and sugar cane, and manufacturing from the latter a crop of sugar and molasses, and being in want of ready funds for said purpose, and requiring advances in money and supplies to feed and pay the laborers and other employees on the said plantation, to maintain the live stock thereon, and to defray all other necessary expenses, they have applied to said James H. Laws & Co. to make the requisite advances and which they hereby agree to do on the following terms,” etc. * * * “That in addition to the said lien and privilege, the said Mr. and Mrs. Capron do hereby grant and consent in their favor a pledge of the crops,” etc. * * * “That the said plantation shall be cultivated to the best advantage by the said owner and lessee, so as to produce therefrom a crop of sugar and molasses, the whole of which they hereby bind themselves to ship and consign to said Jas. H. Laws & Co.,” etc. “And the said appearers having bound themselves to all the foregoing terms, conditions and stipulations, the said Mrs. Capron has, in liquidation of said advances and to facilitate the said Jas. H. Laws & Co. in the transaction of said business, made and subscribed to her own order, and has endorsed three promissory notes,” etc. * * * “Now in order to secure the full and punctual payment of said notes,” etc., “the said Mrs. Mary Berwick

Capron does by these presents specially mortgage her paraphernal property."

There can be no question of the fact that that act bears upon its face indubitable proof that the plantation was operated and cultivated in 1889 upon the joint account of the plaintiff and her husband, and constituted the debt to Laws & Co. an indebtedness of the community and of her husband personally.

The law emphatically declares that if, in the course of the wife's examination by the judge he shall ascertain that either the money to be borrowed or debt contracted is for her husband's "debts, or are for her separate benefit and advantage, or the benefit of his separate estate, or of the community, he shall not give his sanction authorizing the wife," etc. (R. O. C. 127); and it further declares that the judge's "certificate, on presentation to the notary, *shall be his authority for drawing the act of mortgage.*" *Id.* 128.

Consequently the notary acted in direct disobedience to the provisions of the law governing his duties in preparing the act as he did, as well as in disregard of the specific terms of the plaintiff's application and that of the judge's certificate; and being confessedly the adviser of McCann in the premises, the latter became likewise responsible for the disregard of same.

In addition to the foregoing details of the transaction from the lips of the living participants therein, there are many of minor importance which point with unerring certainty in the same direction.

For instance, the correspondence between the parties, their agents and attorneys, with regard to the loan, the execution of the mortgage, the extension of the notes at maturity, the demand for the payment of the fees of a lawyer for making an examination of title; and finally the demand for the payment of the ten thousand dollar mortgage notes which brought about the settlement and change in the form of the titles of the property in 1893 and the execution of the notes which constitute the foundation of this suit.

In not one of these does the name of the plaintiff figure *except to sign her name to the acts* which were necessary for their consummation; and there is nothing in the evidence to contradict or impeach the statements of the witnesses and the recitals of the acts which we have quoted.

Not only so, but the radical errors complained of are those of law,

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and they are plainly apparent from a simple inspection of the plaintiff's application for the judge's authorization, the judge's certificate of authorization and the act of mortgage; and the cause or consideration of the notes of the plaintiff were most distinctly brought home to McCan during the negotiations which led up to the agreement and in its consummation, and same is fully confirmed by the recitals of the Laws & Co. mortgage, which was extant and duly recorded at the time.

The subsequent transactions in 1898 were purely formal, and merely intended to *divest* the title of the plaintiff and *invest* her husband with title. There was no consideration passing from McCan to the *former*, but the surrender of the ten thousand dollar mortgage notes; and none to McCan from the *latter* but the execution of new notes.

The negotiations preceding the transactions foreshadowed the result that was to be accomplished. McCan at no time ceased to be a mortgage creditor, first of plaintiff, and then of her husband; and the property was disencumbered of the mortgage of the former, but to have same immediately replaced by one of the latter. The scheme was intended to have the effect of a sale of the wife's separate and paraphernal property to her husband, in direct violation of the express prohibition of the law (R. C. C. 2446); or if it be given the effect of a security, simply, then it was in violation of R. C. C. 2398.

But it is seriously contended on the part of the executory creditor, that he was not aware of any of the secret equities which existed between McCan and the plaintiff with reference to the original transaction, and that he dealt with J. D. Capron on the faith of his personal inspection of and acquaintance with the public records, upon which no apparent defects were stamped.

But, quite to the contrary, it appears conspicuously from the transcript, that the records upon which he placed reliance did disclose radical and incurable defects; and they further show that, not only was he aware of the nature and origin of the original contract, but that when he was approached by the plaintiff's husband with the view of getting him to take up and extend the ten thousand dollar mortgage notes which McCan held, he made the objection that he did not regard the proposed investment a safe one on account of the

joint ownership of husband and wife, and their joint management and control of the plantation.

Further, that the arrangement consummated was the identical one he proposed, and in the consummation of which McCan, J. D. Capron and he co-operated; but that the plaintiff was conspicuously absent, except in the single circumstance of signing her name to the acts, at the instigation of her husband.

But the original notes were surrendered, and have been destroyed. Mrs. Capron's separate property passed into the hands of her husband, and the defendant received his notes with such a mortgage only as he had power to create thereon.

It is evident from the character of the dealings and transactions of the parties that they did not have the legal effect of passing a valid title from the plaintiff to her husband, and the necessary consequence is, that the husband had no power to create a mortgage on the half interest of the wife thus illegally alienated, which the seizing creditor can enforce.

The act of 1855 has been frequently interpreted to place upon a married woman the burden of proving "that she is not bound for some legal reason;" but that the mortgage and certificate of the judge constitute no estoppel against her showing "that she received no money, as stated, in the mortgage, and that the real consideration for her note was an antecedent debt of her husband." *Barth vs. Kasa*, 30 An. 940; *Rice vs. Alexander*, 15 An. 54; *Bank vs. Barrow*, 21 An. 396.

Accepting this theory she has attempted by the introduction of parol and written evidence *dehors* the act of mortgage, as well as by the recitals of her petition, the judge's certificate, and the act of mortgage, to discharge that burden; and I am of the opinion, in the light of the authorities, that she has done so.

All of the decisions of this court unite in holding that the act of 1855 makes the petition of the applicant, and the judge's certificate of authorization control the subsequent act of mortgage, and render same null and void *ab initio* for any substantial or material variation therefrom.

In *Falconer vs. Stapleton*, 24 An. 89, it was held that the authorization of the judge under the act of 1855 must be given *before* the debt is contracted, or the mortgage is given.

In *Conrad vs. LeBlanc*, 29 An. 123, it was held that a wife's

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authorized mortgage for a certain sum was bad, because the certificate authorized the loan for the purpose of "obtaining supplies to carry on her farming interest *for the present year*, and the act of mortgage secured a loan to enable her to pay her *past indebtedness*," the debt to be provided for preceding in date the date of the judge's certificate.

In Gibson vs. Hitchcock, 37 An. 209, it was held to have been a fact disclosed by the documentary evidence in the record that "the money alleged to have been loaned was not and could not (have been) used for the object described in the application for authorization to contract, and in the judge's certificate;" and the conclusion of the court on that statement was that "if the evidence shows that the contract was not based on the object stated in the judge's certificate, but for a different object to the knowledge of the creditor, the burden of proof that the contract enured to the benefit of the wife is thus shifted on the creditor seeking to enforce the contract."

In Claverie vs. Gerodias, 30 An. 291, it was held that in the hands of a creditor who knowingly accepted a wife's unauthorized mortgage as security for her husband's debt, same is utterly null and void. Barth vs. Bond; Manning's Unreported Cases, 431.

In Stapleton vs. Butterfield, 34 An. 822, it was held that the mortgage of the wife having been given to secure the debt of her husband and her own *past indebtedness*, the mortgage and sale of the plaintiff's property are both nullities.

The authorities are uniform and tend in the same direction.

The case of Henry vs. Gauthreaux, 32 An. 1103, is *sui generis*, and exceptional, in that the opinion stated that "it is indisputable that the two notes referred to were issued by the plaintiff in the capacity of a *single* woman, she representing herself expressly in the act of mortgage as an *unmarried* person," and upon this statement the court say "it is therefore palpable that the plaintiff, while a married person, twice falsely represented herself as a *femme sole*, and upon such fraudulent pretence obtained from a third party the loan of a sum of money which was paid her."

The opinion does not in any manner affect or impair the general principles announced in other cases.

My conclusion is that the plaintiff has made good her claim to relief, and that her injunction should be maintained and perpetuated, and her title and possession recognized and maintained.

State ex rel. Satcho vs. Judge and District Attorney.

No. 12,849.

STATE EX REL. VINCENT SATCHO VS. JUDGE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION A, AND DISTRICT ATTORNEY, PARISH OF ORLEANS.

Every party charged with crime has the constitutional right to have subjected to judicial investigation and testing the fact whether or not any particular charge made against him has come up to the standard of legal requirement or not, but it does not follow from this that in every case where a ruling by a District Court on a motion to quash has been made adverse to a contention on that subject which the party charged has urged, that the action of the court is reviewable by the Supreme Court through *certiorari* and prohibition, particularly prior to trial and conviction.

It will not be assumed that it was the purpose of the Constitution in vesting in the Supreme Court supervisory jurisdiction and in cutting off appeals by parties charged and found guilty of misdemeanors that they could and should be able to obtain not only the same relief that an appeal would give them, but greater relief by shifting the form or method of procedure from a proceeding by appeal to one by *certiorari*.

ON APPLICATION for Writs of *Certiorari* and Prohibition.

W. L. Evans for Relator.

M. J. Cunningham, Attorney General, and Robert H. Marr, District Attorney, for Respondents.

Submitted on briefs December 19, 1896.

Opinion handed down January 4, 1897.

On the 17th of August, 1896, the District Attorney for the parish of Orleans filed in the Criminal District Court for the parish of Orleans, an information against the defendant. On the 4th of December defendant filed a motion to quash the information. He complains that the judge illegally overruled said objection. That by Art. 8 of the Constitution of Louisiana, parties accused are entitled "in all criminal prosecutions" to "enjoy the right to be informed of the nature and cause of the accusation" against him, which means by a long line of precedents resting on principle, that in a prosecution for the commission of a statutory offence the words of the statute or others of fully equivalent import should be employed (*State vs.*

49	231
104	540
49	231
107	708
49	231
112	574
112	578
49	231
116	455
117	430

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Jackson, 43 An. 184). That said criminal prosecution against him is fatally irregular and said information absolutely void, because (1) it does not describe any criminal offence known in the words of any penal statute, or, in "others of fully equivalent import," and because (2) it does not allege that relator was at the time mentioned in said information the proprietor of a place of public business which required a license under a law of the State of Louisiana or under a parochial or municipal law or ordinance." That the Criminal District Court is absolutely without jurisdiction to try said cause by reason of there being no legal information pending against him in said court. That if the judge of said court be not prohibited from proceeding further in the cause, he will force the defendant to trial and impose a sentence upon him (if convicted) in a case wherein there is no appeal and will forever deprive him of his constitutional right to be informed of the nature and cause of the accusation against him before trial, and will thereby cause him irreparable injury. He invokes the exercise of the supervisory jurisdiction of the Supreme Court conferred on it by Art. 90 of the Constitution, he prays for writs of *certiorari* and prohibition and due legal relief.

The opinion of the court was delivered by

NICHOLLS, C. J. The motion to quash was based on grounds substantially the same as those mentioned in relator's petition though somewhat amplified.

It asserts that "the information does not set forth in allegations, facts essential in a *prima facie* case of guilt under Act No. 18 of 1886;" that it does not allege "that relator failed to close such licensed place of business at 12 o'clock on Saturday night; that it does not allege that relator failed and refused to keep such licensed place of public business closed continuously for twenty-four hours thereafter, nor does it allege that relator did unlawfully give, trade, barter, exchange or sell any of the stock or any article of merchandise kept in any licensed establishment on Sunday." The information charges that relator, "on the 14th day of June, one thousand eight hundred and ninety-six, in the parish of Orleans, and within the jurisdiction of the Criminal District Court for the parish of Orleans, being the proprietor of a certain establishment and place of business commonly called a barroom, which, by law, is required

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to be closed at 12 o'clock on Saturday nights, and to remain closed continuously for twenty-four hours, did on Sunday, the 14th day of June, one thousand eight hundred and ninety-six, unlawfully open his said establishment and public place of business aforesaid, and, being the proprietor thereof, did then and there unlawfully give, trade, barter, exchange and sell certain portions of the stock and certain articles of merchandise kept in such establishment and place of business, contrary to the form of the statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same."

By the first section of Act 18 of 1886 it is enacted "that from and after the 31st day of December, A. D. 1886, all stores, shops, saloons and all places of public business which are or may be licensed under the law of the State of Louisiana, or under any parochial or municipal law or ordinance, and all plantation stores, are hereby required to be closed at 12 o'clock on Saturday nights, and to remain closed continuously for twenty-four hours, during which period of time it shall not be lawful for the proprietors thereof to give, trade, barter, exchange or sell any of the stock or any article of merchandise kept in such establishment."

The second section declares a violation of the provisions of the act to be a misdemeanor, and prescribes that on trial and conviction the party found guilty shall pay a fine of not less than twenty-five dollars, nor more than two hundred and fifty dollars, or be imprisoned for not less than ten days nor more than thirty days, or both, at the discretion of the court.

Upon a claim that his constitutional "right to be informed of the nature and cause of the accusation against him" would be violated by the criminal proceedings directed against him under the information copied, and upon an argument that that instrument is absolutely void, it charging no offence against any penal statute of the State, relator invokes the exercise by this court of the supervisory powers conferred upon it by Art. 90 of the Constitution to prohibit the judge of the Criminal District Court for the parish of Orleans and the District Attorney from proceeding further in the cause based thereon.

The eighth article of the Constitution, quoted by relator, does guarantee that in all criminal prosecutions the accused should "enjoy the right to be informed of the nature and cause of the accusation

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against him," and therefore every party charged with crime has the right to have subjected to judicial investigation, and testing the fact whether or not any particular charge made against him has come up to the standard of legal requirement or not. It does not follow from this that in every case where a ruling by a District Court upon a motion to quash has been made adverse to the contentions which the party charged has urged upon that subject, the court's action is reviewable by the Supreme Court through *certiorari* and prohibition, particularly prior to trial and conviction. A judicial tribunal has been called upon in this case to determine whether or not relator could legally and constitutionally be sent to trial upon the charge as laid against him, and it has after hearing held that he could. The authority advancing the charge is separate and distinct from that passing upon the sufficiency of the charge as a basis for prosecution, and therefore it could not be claimed that the constitutional privilege urged has not received impartial judicial consideration. The power to accuse and the power to dispose of the accusation have not centred in one hand. Whether the conclusions reached by a district court in a given criminal case should be final, or whether they should be subject to review was a matter for constitutional provisions to fix. Relator's case is one which, from its character, is not appealable to this court. Our appellate jurisdiction in criminal cases is limited to "questions of law alone, whenever the punishment of death or imprisonment may be inflicted, or a fine exceeding three hundred dollars is actually imposed."

The question on which relator seeks to have us determine adversely to the views of the District Court is not only a question of law, but one which is patent on the face of the record.

Outside of the provisions of the Constitution, prescribing the limits of our appellate jurisdiction, there would be no logical reason why we should not as appropriately through an appeal, pass upon the rulings of a district court, made in prosecutions for minor offences on motions to quash informations or indictments based upon the alleged insufficiency of the allegations, than we should upon rulings of a similar character, made in graver cases, inasmuch as in neither class would we be called on to deal with the facts of the case. The sovereign authority has thought proper, however, to leave the classification of crime to legislative discretion as to their importance and to grant a broader relief in one class of offences than in another. (State ex rel. Bourgeois vs. Police Jury, 45 An. 250.)

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We do not understand that it was the purpose of the framers of the Constitution in vesting in this court supervisory jurisdiction and in cutting off appeals by parties charged and found guilty of misdemeanors that they could and should be able to obtain not only the same relief which an appeal would give them but greater relief by simply shifting the form or method of procedure from a proceeding by appeal to one by *certiorari*. If the General Assembly had thought proper to affix to the violation of the provisions of Act No. 18 of 1886, a penalty of punishment at hard labor in the penitentiary, and relator had stood charged upon the same information which he complains of now as insufficient, the present proceeding through *certiorari* would not be before us, as relator would have to stand his trial and rely upon ultimate relief through appeal. We see no ground upon which to assume that it was intended that he should occupy a better position in this respect by being charged with a lighter offence. Leaving aside any question as to the precise stage of the prosecution at which relator has had recourse to this court, we think that the conditions under which a party charged with crime in a non-appealable case could invoke our supervisory jurisdiction through *certiorari* as against an alleged insufficient information should be of the gravest and most serious nature. We should have to be convinced that the objections to the information were such as in point of fact would leave an accused in ignorance of the nature and cause of the accusation against him. The objections should not be such as the party making them could only hope to succeed upon the application of the most stringent technical rules as to form and as to pleading; such defects as, in our opinion, would really work no injury.

The writ of *certiorari* is not one of right, but one for the exercise of judicial discretion in cases of substantial wrong and injury. We have examined the information filed against relator in this case. We think it does not leave him in ignorance of the nature and character of the accusation against him. That it sufficiently charges a violation of the statutory offence created by Act No. 18 of 1886, and that if it be open to objections, they are not of such a character as to work wrong or injury or to call for the exercise of our supervisory powers.

For the reasons herein assigned, the orders hereinbefore given are set aside, as are the writs based thereon, and relator's application is dismissed.

Town of Mandeville vs. Baudot.

No. 12,006.

TOWN OF MANDEVILLE vs. J. B. BAUDOT.

A person who raises grapes and manufactures them into wines and sells the same at his place of business, in either barroom or grocery, is liable to pay a license tax therefor.

The Legislature can confer by general law on all municipal corporations in the State, an authority to collect licenses. Mayor vs. White, 46 An. 49.

APPPEAL from the Fourth Justice's Court for the Parish of St. Tammany. *Phillips, J.*

Clay Elliott for Plaintiff, Appellee.

P. L. Fourchy for Defendant, Appellant.

Argued and submitted January 4, 1897.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by

MCENERY, J. The town of Mandeville imposed a license tax of one hundred dollars for keeping a wholesale or retail grocery, and selling in connection therewith liquors. The defendant was sued by the town to collect the license tax for having conducted such a business. In the brief of the City Attorney reference is made to Sec. 11 of Act 150 of 1890, imposing a license of one hundred dollars on every business of barroom, drinking saloon, etc., and in the town's laws there is an ordinance for keeping a barroom, the license for the same being one hundred dollars. The evidence in the record does not make it plain whether the defendant kept a barroom, or a grocery store with bar attached.

The witnesses deny that he sold beer or alcohol at his place of business, but in the defendant's answer he admits that he sold wine as "occasion required," that is by retail, but claims that the wine was manufactured by him from grapes raised by him, and that he is therefore exempt from the license tax. The constitutional exemption does not extend to the manufacturing of wine, whiskey or beer.

Wine, like whiskey, is not an agricultural product, although manufactured from such product. The word liquor includes all fermented

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liquors, and where it is sold singly or in company with whiskey, or beer, at a place kept as a barroom, or at a grocery, and sold in connection with the business, the person so selling it by the quantities designated by the statute, upon which the municipal ordinance is based, is liable to pay the license.

It is urged that the town of Mandeville had no authority by its charter to impose license taxes. This authority is not in the original charter. But the revenue acts of 1886 and 1890 authorize all municipal and parochial authorities to impose a license tax. The State unquestionably has the power by a general law to confer power upon municipal divisions, an authority not lodged in their charters. *Mayor and Council vs. White*, 46 An. 450.

It is alleged that the ordinance is illegal, not having been properly enacted. We are not informed as to what essentials are lacking in its enactment. From the record it appears to have been enacted with as much formality and regularity as usually attend municipal ordinances.

Judgment affirmed.

No. 12,169.

MRS. M. J. CALLAHAN ET AL. VS. CALLAHAN FLUKER.

Where there is an order for the advertisement of the application for the appointment of an administrator, and the order recites that the applicant shall be appointed if no opposition is made, if no appointment is made after this order and the administrator gives bond and makes affidavit, the bond and the affidavit will not authorize him to act as administrator. An order for the sale of property of the succession, by such administrator, is null and void, and if a party purchase succession property under the order, and has been instrumental in provoking the order with full knowledge of the irregularities in the administration, the sale will be set aside and the property returned to the succession for administration.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

William Winans Wall for Plaintiffs, Appellees.

Thomas J. Kernan for Defendant, Appellant.

Argued and submitted December 19, 1896.

Opinion handed down January 18, 1897.

Callahan et al. vs. Fluker.

The opinion of the court was delivered by

McENERY, J. This case was before us at our last session. We then reversed the judgment of the District Court, which had sustained defendant's plea to the jurisdiction of the Civil District Court, and dismissed plaintiffs' suit and remanded the cause to the lower court for further proceedings according to law. Plaintiffs' pleadings will be found given in full in the report of the case at page 427 of the 47th Annual, entitled Callahan vs. Fluker. For present purposes it will suffice to say that the suit is a petitory one brought by the children of Louis H. Young, seeking to recover from defendant property alleged to have belonged to their father, of which they averred defendant to be in illegal possession. As part of the history of the case, they averred the death of Louis H. Young, in the parish of East Feliciana, and declared that defendant asserted ownership of the property in question to have vested in him under a judicial sale which they allege was an absolute nullity. We will have occasion in the body of this opinion to refer to the different reasons upon which they ground that contention. On the return of the case, defendant answered, pleading, first, the general issue. He admitted that he was in possession, as owner, of some lands claimed in the suit by the plaintiffs, a list of which he annexed to his answer. In respect to all other lands claimed he denied that he was in possession of, or claimed ownership thereof. He averred that the lands contained in the exhibit which he annexed were purchased by him in good faith at a regular probate sale made by the sheriff of the parish of East Feliciana on December 8, 1894, in pursuance of a valid decree of court to pay debts, granted by the Sixteenth District Court for the parish of East Feliciana, on October 8, 1894, in the matter of the Succession of Louis H. Young of the docket of that court; that he had lawfully continued in the open and uninterrupted possession of said lands as owner ever since the date of said sale; that his title is protected by said order; that neither said order for the sale nor the sale made thereunder could be collaterally attacked or drawn in question before any court, except that in which said proceedings were had. He denied that he was acting in any fiduciary capacity which disqualified him from becoming the purchaser of said lands, and averred that said bid for the same was made unwillingly for the purpose of realizing costs only after the plaintiff had apparently abandoned the succession and

after the lands had failed to sell at public offering for want of a bidder. He averred that the title to the portion of the lands was inchoate, imperfect or bad, and that he expended much labor, skill and money in perfecting the title to the lands described in his exhibit to the aggregate value of at least one thousand five hundred dollars; that in the event of his eviction from the lands he should recover said amount as a condition of their taking possession of the same. He pleaded the prescription of five years against all irregularities or informalities, if any there were in said probate sale, and the prescription of ten years *acquirendi causa*. He prayed that he be quieted in his title and possession of the lands, and contingently upon being evicted that he have judgment against the plaintiffs for fifteen hundred dollars, with legal interest.

There was judgment for plaintiffs. Defendant appealed.

The first difficulty which confronts us is whether or not a direct action is necessary in order to annul the order of sale attacked in this suit. Ordinarily an attack to annul a judgment must be by direct action. There can be no questioning of the well-established jurisprudence on this point. *Duson, Curator, vs. Dupré et als.*, 32 An. 896; *Grevemberg vs. Bradford*, 44 An. 400; *Heirs of Ford vs. Mills & Phillips*, 46 An. 331.

In the case of *Heirs of Ford vs. Phillips*, *supra*, (46 An. 331) there was an order directing the application for the administration of the succession to be advertised, and in case of no opposition being filed the applicant to be appointed. Following this order, letters of administration issued to Dean, reciting that he had been appointed administrator of the succession and had taken the oath and executed the bond required by law, and it was further declared that the applicant was confirmed in his appointment. An order of sale was issued to sell property to pay debts. It was sold, and found its way eventually to a third innocent party, against whom suit was brought to recover the same. The appointment of administrator and the sale were alleged to be nullities. We held that the order appointing the administrator could not be attacked collaterally, and assumed as a fact that between the issuing of letters of administration and the application for the administration there had been a direct appointment of administrator. The letters of administration directly warranted this assumption, as they recited facts, the appointment, etc., which had been done.

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In this case there is no room for an inference that an appointment had followed the conditional order, and in this case there is no innocent third purchaser invoking the order for his protection as in the case cited.

There may be also irregularities preceding the order appointing the administrator, which could only be reached by a direct action.

But in this case there was no advertisement preceding the appointment. There was an order requiring an advertisement and a conditional order that the applicant be appointed administrator in case no opposition was made to the application. No appointment followed this order. The administrator, however, furnished a bond and made the required affidavit. These requisites could only be based upon a prior order of the appointment of an administrator, and none having been made they are valueless as authority for the administration. There was then no appointment of administrator. Succession of Gusman, 85 An. 405; Pfarr & Kuhlman vs. Belmont, 39 An. 298.

In a contest for the appointment of an administrator the facts recited would establish the proceedings following the application for the administration were absolute, and not relative nullities, and no direct action was necessary to have them declared so. *Id.*

It is firmly fixed in our jurisprudence that a purchaser at probate sale is not bound to look beyond the judgment ordering the sale. He is not bound to inquire into irregularities preceding this order. The duty is not imposed upon him to inquire into the regularity of the administrator's appointment. It is enough for him that the administrator is recognized by the court as such, and is acting under the eye of its authority. Succession of John Gurney, 14 An. 622; Mitchell, Dative Testamentary Executor, vs. Levi, 23 An. 630.

But the purchaser at such sale must be a *bona fide* purchaser—that is, he must not be in fraud or collusion, and the order must not have been through his own acts. In this case there are no such charges as fraud and collusion. The case rests on the active participation of the defendant in the procurement of the order under which the purchase was made.

From the testimony it appears that the succession had been abandoned by those in interest. The attorney, the defendant, had rendered valuable services to the succession, and his only means of realizing his debt against the same was by purchasing the property at succession sale. The price was totally disproportionate to its

Siebert, Wife vs. Klapper, Husband.

value, at least at the present time. Its present value, no doubt, has stimulated pursuit for its recovery. The record shows that the defendant was the attorney of the succession. He filed the application for its administration—in fact, all applications for the order in the case. He was not, then, an innocent third party buying at probate sale who can invoke the order for his protection, nor can he plead prescription as to irregularities, the direct result of his own professional acts.

Having knowledge of the entire proceedings and having been the author of them, and the beneficiary of them, he can not set up the plea of relative nullity and require a direct action to annul them. So far as he is concerned and those having an interest the order of sale was an absolute nullity. The evidence discloses, while acting as attorney, he was, in fact, the agent and attorney of the succession, the practical administrator, a condition imposed upon him, not directly by his own act or solicitation, but from the very necessity of connection with the succession and its abandonment for years by those interested in it. There was no duly appointed administrator, and the defendant, in fact, acted as such. In that capacity he was without authority to purchase. The application for the appointment of an administrator still exists. It has not been disposed of in the lower court. *Kullman vs. Belmont*, 39 An. 298.

The judgment appealed from is amended so as to reverse that part in favor of the plaintiffs which restores to them and gives them title to the property, and the adjudication to defendant be annulled and the property be restored to the succession. In other respects it is affirmed, reserving to the defendant the right to assert his claim for fees against the succession, when duly and properly under administration. Plaintiffs to pay costs of appeal.

No. 12,184.

ELEONORA SIEBERT, WIFE OF JOHN W. KLAPPER, vs. JOHN W. KLAPPER, HER HUSBAND.

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The issue is principally of fact.

The plaintiff complained of the violent treatment of the defendant toward her.

She alleged one of the causes of divorce set forth in Art. 138 of the Civil Code.

The proof sustains the averments.

There was no alternative save to affirm the judgment.

Siebert, Wife vs. Klapper, Husband.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Henry P. Dart and Benjamin W. Kernan for Plaintiff, Appellee.

Ambrose Smith and O. W. Long for Defendant, Appellant.

Argued and submitted December 17, 1896.

Opinion handed down January 4, 1897.

Rehearing refused February 1, 1897.

The opinion of the court was delivered by

BREAUX, J. The plaintiff brought this suit against her husband for divorce. In her petition she charged that she was ill treated, frequently struck and bruised by her husband. She alleged further that recently she had discovered that for three years past he had frequented houses of ill fame, associating with lewd women and committing acts of adultery.

These charges were denied by the defendant.

The case was tried by a jury. From the verdict and judgment of divorce the defendant appeals.

The epithets applied by the defendant to the plaintiff in the presence of third persons were offensive and the unfounded imputations were greatly injurious and in direct violation of the duty marriage imposes.

In addition, he, in a number of instances, without provocation, it appears of record, resorted to personal violence. Blows were inflicted, leaving marks of their severity upon plaintiff's face, such as to bring on a condition of irreconcilable animosity. The injuries, unprovoked, we gather from the testimony, were frequent and grave. The testimony reveals that they were not unknown to others, and in consequence doubly injurious. The ill treatment proven was enough to render their living together insupportable. It was, in our opinion, sufficiently grave to serve as the basis for a demand in separation from bed and board.

We can not, however we regret it, stop here and limit our decree to one of separation from bed and board.

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Dissolving matrimonial ties is not under any circumstances a pleasant duty.

We can not ignore the charge of adultery sustained (indirectly at least), as it is, by a number of uncontradicted witnesses. It is urged on the part of the defendant that there is no direct proof of adultery. That may be true, and none the less presumption may establish the adultery charged.

It is urged further that the only evidence approximating to proof of adultery consists of statements, said by the witnesses to have emanated from the defendant husband himself.

Returning to the first proposition as to direct proof.

It is well settled in principle; announced by the text writers, and by numerous decisions, that direct proof is not always necessary. A simple presumption may prove a fact, in cases such as that we now have under consideration, as well as in other cases.

From Baudry Lacantinerie, Vol. 1, p. 413, we translate and quote:

Adultery invoked as a cause of divorce may be proven by witnesses and even by simple presumptions.

Doctrine and jurisprudence are in accord upon a point which offers no difficulty.

Unquestionably the facts to give rise to a conclusive presumption must be pertinent and true.

We will not detail all the facts here. It would serve no useful purpose. We have passed them in review with care and attention.

We will state that it is in evidence that at late hours the defendant visited houses of ill fame in company of a number of others; they drank and made merry with the inmates; they, during the visit remained together, left together, parted, and it may be that all went to their respective homes.

But the utterances of the witnesses, as written in the transcript, were not of such a character as to inspire absolute confidence that such was the fact. There are other incidents giving rise to one inference only; such as for instance, after the wife had been compelled to leave their home, because of the ill and violent treatment to which she was subjected, a young girl and her mother were received in the house. A witness testifies that she was "cooking there; she was a house girl and everything."

This young girl sent away her mother, expelled her from this

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house and remained alone under circumstances not suggestive of absolute innocence in her relations with the defendant.

“Where, as in the present case, from the circumstances proved, no other inference can be drawn, but that there was an improper intimacy or illicit connection between the parties, the fact of adultery or concubinage must be considered as substantiated.” *Mehle vs. Lapeyrollerie*, 16 An. 4.

But it is said that the statements of the defendant admitted as evidence should not be considered for the reason that Art. 2281, C. C., as amended by Act 58 of 1888, declares that such statements shall not be received in evidence in suits for divorce.

There was no confession by the defendant and his statements are not sufficient to sustain the charge set forth in the petition. As part of the case they merely corroborate the facts proved. The testimony to show that a fact was acknowledged is not admissible in evidence. Chance incidents, however, may be shown, or utterances of no great importance may be proven as a part of the *res gestæ* without giving ground to annul the verdict of a jury and judgment of the court. *Mack vs. Handy*, 39 An. 491, 499.

The judgment of the District Court is affirmed.

No. 12,296.

EDWARD P. WEBB vs. M. H. ROTHSCHILD.

Exemplary damages will be allowed against a party who makes a violent assault on another and strikes and wounds him. 34 An. 1107.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Merrick & Merrick and H. M. Ansley, for Plaintiff, Appellee.

Farrar, Jonas & Kruttschnitt for Defendant, Appellant.

Argued and submitted January 7, 1897.

Opinion handed down January 18, 1897.

Webb vs. Rothschild.

The opinion of the court was delivered by

McKENNEY, J. The plaintiff brought this suit to recover of the defendant the sum of six thousand and seventeen dollars as damages inflicted upon him by an assault and battery on the 13th day of June, 1894.

There was judgment for the plaintiff in the sum of one thousand dollars.

The case was tried without the intervention of a jury.

The defendant is a clothing merchant on Canal street. The plaintiff had purchased a vest at defendant's store for the sum of ninety cents, the price having been reduced from one dollar and twenty-five cents, because of its damaged condition. The plaintiff says, when shown to him the vest was damaged on one side, and that when he left the store, on examination he found the vest damaged on both sides. He, within an hour, returned to the store, and demanded his money on the return of the vest. The defendant requested him to take another vest. He insisted upon his money being returned. It was returned to him. In the act of leaving the store and when near the exit, the defendant called to plaintiff and told him, with an opprobrious epithet, not to come back into his store. The plaintiff replied that he would not "come back into the darned store any more." The defendant then put himself in front of the plaintiff and asked him what he said, when he repeated his reply to defendant. Thereupon defendant assaulted him.

The testimony shows that the defendant was the aggressor in language and conduct. There was no provocation for the assault, and nothing attending it to justify its violent continuance. The plaintiff was an old man fifty-five years of age, sick, weak and very feeble.

The plaintiff is entitled to a judgment. *Sheen vs. Poland*, 34 An. 1107.

The facts in this case, so far as exemplary damages are involved, are almost identical with those in the case cited. We will therefore fix them at five hundred dollars. In both cases the assault was unprovoked, violent, and a wound inflicted. For the special damage inflicted we think one hundred dollars will be full compensation.

The judgment is amended so as to reduce the judgment in favor of plaintiff to the sum of six hundred dollars, plaintiff to pay costs of appeal.

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No. 12,382.

SIMON AND MARK PINSKY VS. JULES A. RESWEBER.

In the case of insolvency where two appeals have been taken from two different orders, one to the Circuit Court of Appeals and the other to this court, the Supreme Court is only concerned with the appeal to it. The fact that two orders of appeal were thus granted is no ground for dismissal of the appeal sent to the Supreme Court.

The oath of a proxy of a creditor must be direct and positive as to the existence of the debt. "From the best of his knowledge and belief" is not sufficient, as this shows on its face that the knowledge is derivative. But where the oath of the proxy is direct, positive and unequivocal, this authorizes the proxy to vote at the meeting of creditors.

The validity of the debt can only be questioned in an opposition to the distribution of the fund.

A PPEAL from the Nineteenth Judicial District Court for the Parish of St. Martin. *Voorhies, J.*

Martin & Voorhies for Plaintiffs, Appellees.

James Simon and James E. Mouton for Defendant, Appellant.

Argued and submitted January 5, 1897.

Opinion handed down January 18, 1897.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MCENERY, J. The motion to dismiss the appeal recites that two orders of appeal were granted in this case; one to the Circuit Court of Appeals, on the order for a meeting of creditors, and the second, in opposition to proceedings of the meeting of creditors, to this court, and that there is but one appeal bond in the record, and that the same is insufficient, as it does not mention the number of the suit, when the judgment was rendered, the nature of the judgment, in whose favor the judgment was rendered; nor is it shown in the bond who are appellees and appellants.

It does not appear that the appeal to the Circuit Court of Appeals was perfected. At any rate we have nothing to do with the appeal

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to that court, but are only concerned with the jurisdiction of this court. The plaintiffs' claim is for seventy-eight dollars or thereabouts. They are pursuing a fund for distribution exceeding two thousand dollars. There is a contest of creditors which would eventuate in the final distribution of this fund if the plaintiffs succeed in their contention. The case is as though the debtor had made a voluntary surrender, and there was a contest among creditors for the settlement of the rights, which went to the whole fund.

In obedience to the order of court the debtor filed his schedule, and it shows a fund exceeding the lower limits of our jurisdiction. The whole contention is the disposition of this fund, whether it shall be surrendered, or whether it shall remain in the hands of the debtor. There is no contention as to the claim of plaintiffs.

Motion denied.

ON THE MERITS.

The plaintiffs were judgment creditors of the defendant. They caused an execution to issue on their judgment. It was returned "No property found." They then proceeded under Sec. 1781, R. S., to compel the defendant to surrender his property to his creditors. The judge ordered a meeting of creditors. They voted against the surrender. Opposition was made at the meeting to the votes of certain creditors, because the proxy's oath to the claims held by him were insufficient, and his knowledge of the debts was not personal, but derivative. An opposition was filed to the *process verbal* of the meeting of creditors and the proxy stated the source of his knowledge of the indebtedness. The debtor had placed all the claims in his schedule, to which he made oath. The proxy's testimony was that he based his affidavit on the schedule acknowledgment of the debt and from information derived from his clients. The acknowledgment of a debt by the debtor is the highest evidence of its existence. We do not see how an agent could get better personal knowledge of the debt than by its acknowledgment by the debtor. The schedule acknowledgment, however, is not conclusive on the creditors. But the contention as to the existence of the debt is a question which can only come up on opposition to a distribution of the fund. For all purposes of voting the affidavit of the creditor, or his proxy to the absolute existence of the debt is sufficient.

When the oath is positive and is not from belief, or as it is

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expressed sometimes, to the best of his knowledge and belief, it is sufficient basis for the right to vote.

The proxy presented a list of all the creditors he represented. This was preceded by a statement that the proxy represented the "following creditors of Jules A. Resweber, to-wit" (then followed names and amounts, the affidavit, after list of names):

"Said James Simon further declares that his constituents are *bona fide* creditors of the said Jules A. Resweber in the sums above specified. Appearer James Simon further votes in the names of his said constituents against the surrender of the property of Jules A. Resweber to his creditors." This oath was positive and direct as to the existence of each claim presented by him. Power of attorney accompanied each claim, and there could be no objection to the mode and manner of voting all the creditors represented at one time instead of calling the name of each and voting it in the *proces verbal*.

The placing of the debt on the schedule by the debtor gave it a *prima facie* existence. The oath of the proxy was that the debts were *bona fide* debts against the debtor. This was a sufficient verification of the debt to entitle the creditor to vote at a meeting of creditors. No other evidence is required to entitle the creditor to vote. "The fact that the opponent opposed the votes before the notary does not change the relative position of the parties." *Mercedal, Jr., vs. His Creditors*, 16 An. 82; *Spears vs. His Creditors*, 40 An. 650.

In that case the court further said:

"The burden of proof would necessarily rest on the creditor on an opposition to a tableau of distribution, and the reason for the difference is obvious. In the first place the interests of the mass of creditors requires that the property of their common debtor should be applied to the payment of their claims without unnecessary delay, and in the next place a judgment liquidating a debt in a litigation of this kind would not be binding on the creditors, who were strangers to the proceeding."

There was objection made to the voting of other creditors because the oath to their claims was not made before the notary holding the meeting. The District Judge sustained the vote. It is not essential that the creditor should make oath to his debt before the notary. He can make it at his domicile, and when presented by his proxy it has

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the force and effect as though made in person by the creditor before the notary holding the meeting. *Phillips vs. Her Creditors*, 36 An. 904.

Walmsley filed an opposition to the *proces verbal* of the meeting of creditors. He did not appear in person or by proxy, and his opposition came too late.

The judgment appealed from is annulled, avoided and reversed, and it is now ordered that the demand of plaintiff for the surrender of his debtor's property be dismissed.

No. 12,379.

STATE EX REL. CITY OF NEW ORLEANS VS. GABRIEL FERNANDEZ,
JUDGE OF THE SECOND CITY COURT.

The Constitution confers jurisdiction upon the city courts of the city of New Orleans to entertain suits in which the exact sum of one hundred dollars may be involved, without reference to any computation or allowance of interest.

The words of the Constitution, "exclusive of interest," mean that jurisdiction must be determined without any regard to interest, whether accruing or accrued.

ON APPLICATION for a Writ of *Mandamus*.

S. L. Gilmore, City Attorney, and W. B. Sommerville, Assistant City Attorney, for Relator.

Respondent *in propria persona*.

Submitted on briefs January 4, 1896.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by

WATKINS, J. Relatrix' application is predicated upon the averment that in the matter of her demand against the commercial firm of L. E. Jung & Co. for the payment of a license of one hundred dollars for carrying on their business of retailing liquors for the year 1896, with two per cent. per month interest from the 1st of March, 1896 and costs, the respondent declined and refused to take jurisdiction,

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on the ground that the amount in dispute was in excess, or beyond the upper limit of the jurisdiction of his court, which is fixed in the Constitution at one hundred dollars, exclusive of interest. Const., Art. 135.

And she invokes the supervisory power of this court to compel the respondent by our writ of *mandamus* to take jurisdiction of said cause, and try and decide the same.

The respondent's return affirms that his court is without jurisdiction to entertain and decide the suit of the relatrix, because it is for an amount in excess of one hundred dollars—same being for the sum of one hundred dollars—with the interest that has accrued thereon since March, 1896.

It further suggests that the two per cent. per month which the law allows to be assessed against delinquent license payers is in its essence and nature a penalty, and not interest in its ordinary acceptance.

Counsel for the relatrix cites and principally relies upon the decisions of this court in *State ex rel. Forman vs. Recorder*, 38 An. 14, and *Breaux vs. Recorder*, 36 An. 742; and, on the other hand, the respondent cites and relies upon that of *Bruno vs. Oviatt*, 48 An. 471.

Dealing first with the case last cited, we find it to have been an action to revive a judgment; and we treated the interest which had accrued on the demand in the *original* suit at the time it was filed, as having formed a part of the demand upon which the judgment was pronounced, and which the suit then before us was intended to revive. That is to say, to the extent and for the purpose of determining the jurisdiction of the suit to revive, it was the *judgment* liquidating the debt and making it executory that we dealt with, jurisdictionally speaking, and not the debt itself.

The decisions on which we rested our conclusions are the following, viz.: *Mason vs. Oglesby*, 2 An. 793; *Cornell vs. Geddes*, 10 An. 170.

Those decisions were rendered while the Constitution of 1868 was in force, the provision of which declared that the jurisdiction of the Supreme Court "shall extend to all cases when the matter in dispute shall exceed five hundred dollars" (Art. 74); whereas the framers of the Constitution of 1879 added the words "exclusive of interest." Art. 81.

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We find in the brief of the City Attorney the following quotation from the case of *Forman vs. Recorder*, 38 An. 13, which we have examined and verified, and reproduce it here as giving a very clear and lucid interpretation of our appellate jurisdiction, viz.:

"From the showing of the City Attorney himself, it appears that the principal of the city's claim in this case amounts to only five hundred and eighty-four dollars and eighty-eight cents, but he contends that the interest accrued at the time of suit, amounting then to four hundred and forty dollars, must be added to the capital in determining our jurisdiction. He quotes with apparent confidence several decisions of this court in support of his theory, but he evidently lost sight of the fact that the case on which he relies originated under the Constitution of 1868, which provided that the jurisdiction of the Supreme Court should 'extend to all cases when the matter in dispute exceeded five hundred dollars,' and made no mention of interest.

"Under such a provision the court very properly ruled that interest accrued at the institution of the suit, was part of the matter in dispute, and should be considered, with the principal or capital of the demand, in determining its jurisdiction.

"But under the present Constitution it is provided that the jurisdiction of the Supreme Court 'shall extend to all cases when the matter in dispute shall exceed one thousand dollars, *exclusive of interest.*' The difference between the two provisions is striking and glaring, and presents a self-evident proposition. *In one case interest forms part of the matter in dispute; in the other, interest must be specially excluded in determining the jurisdiction of the court.*

"It follows, therefore, that the matter in dispute in this case does not exceed one thousand dollars, *inclusive of interest*, and that we have no jurisdiction."

And the further extract from *Breaux vs. Recorder*, 38 An. 742, viz.:

"In their petition plaintiffs allege that these taxes, *together with penalties and interest*, exceed in real value eighteen hundred dollars, and that, therefore, their actual interest in the controversy is equal to that amount. Hence, their counsel contended that their 'jurisdictional allegations' clearly bring their case within the reach of our jurisdiction.

"But allegations of 'jurisdictional facts' are not the exclusive test

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of a question of jurisdiction. 'The real amount in dispute, whenever the same can be legally ascertained from the pleadings and documents annexed and not the allegations of parties, is to be the test of our jurisdiction, and shall be our rule in determining all such questions.' *Wilkins vs. Gantt*, 32 An. 929. Applying this rule to the case at bar, we find that the alleged sum of eighteen hundred dollars includes taxes amounting, in capital, to seven hundred and seventy-eight dollars and fifty cents, and that the balance comprises penalties and interests, as alleged by plaintiffs. * * *

"The real amount in dispute is the amount of taxes in capital, bearing interest from the dates at which the respective amounts became due, as hereinabove stated. * * *

"Under the textual provision of the Constitution our jurisdiction only attaches when the matter in dispute, exclusive of interest, exceeds one thousand dollars.

"We know of no provision in the Constitution, or in our laws, which contemplates an exception to that rule in cases involving the erasure of inscriptions of tax mortgages, and plaintiff's counsel, have pointed to no authorities in support of such a proposition. The argument that interest on taxes must be included in the matter in dispute, because it is alike secured by the mortgage which secures the principal tax, is not sound." * * *

The reasoning of the court seems clear, and the language of the Constitution itself is very plain; and the incorporation of the words "exclusive and interest" in the article of the present Constitution, in addition to that of the Constitution of 1868, seems to have been done *ex industria*.

And the language of the Constitution appertaining to the jurisdiction of the city courts is exactly similar, and must be controlled by the same rule of interpretation.

We think that, following the rule of interpretation announced in those cases, interest must be excluded from consideration in determining the original jurisdiction of the city courts, as it is in determining the appellate jurisdiction of this court—the constitutional provisions applicable to each being identical.

But in so deciding we do not intend to change or depart from the theory of our opinion in *Bruno vs. Oviatt*, with reference to revival suits.

With reference to the two per cent. per month being of the nature

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and essence of a *penalty* and *not interest*, and, consequently, to be treated as capital forming part of the matter in dispute in determining jurisdiction, we are of opinion that respondent's contention is not sound.

The language of the statute is, "that all unpaid licenses shall bear interest at the rate of two per cent. per month from the first day of March," etc. Sec. 26 of Act 150 of 1890.

The statute was carefully considered and construed in *City vs. Freman's Insurance Co.*, 41 An. 1142, and that decision was affirmed in *City vs. Pontchartrain Railroad Company*, 41 An. 519.

It is our decided conviction that the respondent's court is vested with original jurisdiction of the amount of exactly one hundred dollars, excluding any computation of interest.

Entertaining this opinion, the writ of *mandamus* will be made peremptory.

It is therefore ordered and decreed that the writ of *mandamus* provisionally granted be made peremptory, and that the respondent be taxed with costs.

No. 12,240.

THE STATE vs. JOHN SCOTT.

The law presuming sanity, the burden is on the accused urging his insanity as a defence, to prove it. Archbold Criminal Law, p. 549 *et seq.*; 2 Bishop Criminal Procedure, Sec. 672 *et seq.*

That proof must satisfy the jury the accused was not of sane mind at the time of the act charged; they should consider all the testimony before them, whether produced by the accused or the State, and give due weight to the presumption of sanity; if on the whole testimony, and giving to the presumption of sanity its full operation, they are satisfied the accused was insane when the act was committed they should acquit, but if not thus satisfied they should deem the accused sane and responsible. Archbold Crim. Law, p. 549 *et seq.*; 2 Greenleaf on Evidence, Sec. 173; 2 Bishop Criminal Procedure, Sec. 675 *et seq.*; Wharton's Criminal Law, Sec. 62 *et seq.*; *Davis vs. United States*, 160 U. S., p. 469.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Moise, J.

M. J. Cunningham, Attorney General; *R. H. Marr*, District Attorney, and *John J. Finney*, Assistant District Attorney, for Plaintiff, Appellee.

49	253
49	1094
49	253
4110	14
49	253
113	984
4113	988
49	253
1118	277

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Chandler C. Luzenburg and Bernard Titcher for Defendant, Appellant.

Argued and submitted November 21, 1896.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by

MILLER, J. The accused, indicted for murder, convicted and sentenced for manslaughter, takes this appeal.

The accused relies on a number of exceptions to the charge of the judge. But the question sought to be raised in nearly all is as to the correctness of the charge in respect to the defence of insanity, and the refusal of the instruction on that subject requested on behalf of the accused. On this defence of insanity the instruction in part was:

"Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be satisfactorily proved. When insanity is set up as a defence for crime, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof. The degree of proof must be by a preponderance of evidence. This does not mean a preponderance of witnesses, but it means that, taking all the evidence into consideration, the weight and effect of it is to satisfy your minds that at the time of the commission of the act the prisoner was insane. The presumption of sanity must be overthrown, and this presumption exists with as much force as the presumption of innocence.

"As the law presumes a man to be innocent until he is proven guilty, if there is a reasonable doubt as to his guilt, this degree of proof as to guilt does not overcome the presumption of innocence, and he should be acquitted. The presumption of sanity is a logical parallel to the above rule. Men are presumed to be sane until they are proven insane. If there is a reasonable doubt as to their sanity, this degree of proof as to insanity does not overthrow the presumption of sanity, and the jury should find him sane. These two presumptions of law as to 'innocence' and 'sanity' stand upon the same footing. The burden is upon the State to overcome the presumption of innocence, while the burden is upon

the defendant to overcome the presumption of sanity when insanity is set up as a defence, and both presumptions should be overcome beyond reasonable doubt." To this part of the charge the defendant excepted as ambiguous, contradictory and not a correct exposition of law. It is urged on us that this portion of the charge placed before the jury for their guidance two different rules of proof; one that the preponderance of testimony sufficed, and the other that proof beyond a reasonable doubt was required to establish insanity as a defence. Our decision is controlled by a more important factor.

The objection in varied forms presented by the other bills is, in effect, that the charge is erroneous in its requirement of the degree of proof requisite to support the defence of insanity. The charge recognizes the distinction between the preponderance of proof and that which excludes all reasonable doubt, and instructs that the burden is on the accused to prove beyond all reasonable doubt he was not sane at the time of the commission of the act charged. The charge follows that sustained by our predecessors in *State vs. De Rance*, 84 An. 186, and in *State vs. Burns*, 25 An. 302, and *State vs. Coleman*, 27 An. 691.

Without the sanity of the accused there can be no guilt. Humanity and the law alike concur in this and utterly exclude punishment for crime when there is no moral responsibility of the accused. It is familiar that guilt must be proved beyond a reasonable doubt before punishment can be inflicted. Yet the charge in this case places on the accused the burden of disproving one of the constituents of guilt, and exacts of him the highest order of proof known to the law. In both aspects the proposition has been controverted by text writers and decisions. The preponderance of proof is recognized as that of a character to satisfy the mind, though it be not free from reasonable doubt. This preponderating proof is enough in civil cases to authorize a finding in favor of the party. The terms are of constant use in the administration of the criminal law. The charge in this case implies, if it does not express, that though there may be a preponderance of testimony before the jury to show that the accused was insane at the time of the act, yet they may convict. It is not easy to conceive that with this preponderating proof they can deem guilt established beyond a reasonable doubt, the prerequisite of any conviction. Can, then,

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this charge be sustained which exacts punishment with preponderating proof producing not only a reasonable doubt of guilt, but preponderating to carry the conclusion that no guilt can exist, because of the absence of that moral accountability, the basis of all punishment for crime. Between hanging the maniac or bringing to the scaffold one whose insanity is established by a preponderance of testimony before a jury that pronounces him guilty, is a difference in degree, not of principle. A conviction when insanity is thus proved this charge sanctions.

If we turn to the authority of text-books and decisions it must seem difficult to maintain the charge, conceding all due weight to the decisions of our predecessors, and types of that class in some of the decisions of the courts of other States. In *State vs. Spencer*, 1 Zabriskie (N. J.), 196, the court instructed, if in weighing testimony of insanity against that of sanity the scales are balanced or so nearly poised as to leave a reasonable doubt of insanity, the accused was to be deemed sane. This decision, that sustains punishment when guilt is ascertained by the balanced or nearly poised scale, is in marked contrast with the rule that exacts proof of guilt beyond all reasonable doubt. In one of the text-books there is the comment, the decision has been departed from in the New Jersey courts, 1 Bishop, Criminal Procedure, Sec. —. The case of *Regina vs. Layton*, 4 Cox Criminal Cases, is cited by the State as supporting the charge under consideration. But as we gather that decision from the report. the instruction was that sanity was to be presumed till the contrary was proved, and the question for the jury was whether the accused had proved to their satisfaction he was not of sound mind. There was no requirement of proof beyond that point—i. e., the satisfaction of the jury. All the decisions tending to exact from the accused a higher degree of proof have had our attention. On the other hand the text-books and the weight of the decisions while affirming that the burden of proof of insanity is on the accused, maintain that the proof suffices that establishes insanity to the satisfaction of the jury. In 1 Waterman's Archbold there is an array of authority; with others the case of *McNaughten* is cited, much discussed in the House of Lords, and led to questions propounded to the judges as to the terms in which the question of insanity should be submitted to the jury. The answer was that the accused was to be presumed sane until the contrary was proved to the satisfaction of

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the jury. That charge is brief, plain and easily understood. It is commended in all the text-books. It exacts no greater degree of proof than that required to satisfy the mind and precludes any acquittal for insanity when the proof does not convince the jury on the point of inquiry. Other authority arrayed by Mr. Archbold is to the effect that the testimony of insanity must be sufficient to overrule the presumption of sanity and satisfy the jury the accused was not sane, or as put in another form, to sustain the defence the evidence must convince the jury that when the act was done the prisoner was not conscious he was committing crime. 1 Archbold, pp. 37, 38 *et seq.* Other decisions have qualified the proof to be administered by the prisoner as a preponderance of the whole evidence that he was sane when he committed the act. 7 Gray, p. 583; 7 Metcalf, 500, 506. The charge sanctioned in 1 Curtis, C. C., p. 1, was that the burden resting on the accused to prove insanity the whole evidence must satisfy the jury the prisoner was insane, otherwise he should not be acquitted. In Wharton's Criminal Law the text is the defence of insanity must be proved by the accused as an independent fact, and he alludes to the Spencer case and to decisions on the other hand, maintaining the sufficiency of preponderating proof of insanity. In the later edition of Wharton this preponderating proof is stated to be all that is required. Wharton's Criminal Law, Sec. 711 and notes; 10th Edition, Sec. 62 and notes. It is Mr. Bishop's view, reviewing all the authorities, that it is never incumbent on the State to give affirmative evidence of the sanity of the accused, but if denied by proof administered by him the jury alone with the presumption of sanity must consider all the evidence, and if then they entertain a reasonable doubt of whether the accused did the act in a sane state of mind, they are to acquit, otherwise they are to convict. 1 Bishop Criminal Procedure, Sec. 334.

The same view substantially has been announced quite recently by the Supreme Court of the United States and is thus expressed in the head-note: no man is to be deprived of his life under the forms of law unless the jurors who are to try him are able on their consciences to say that the evidence before them, whether adduced on his behalf or by the State, is sufficient to show beyond a reasonable doubt every essential of the crime, and mental competency to distinguish between right and wrong was, of course, recognized as one

of the constituents of the crime. *United States vs. Davis*, 160 U. S., p. 469. In the light of principle and authority we can not assent to the proposition affirmed by this charge that with preponderating testimony of the insanity of the accused they may convict on the theory that a higher order of proof is required. In this view the sentence must be reversed.

In view of the new trial we deem it proper to say with respect to other objections reserved by accused that the charge in a criminal case should be restricted to the questions fairly arising on the testimony. In our view the explanation of insanity, whether it be termed temporary or epileptic in its character, was sufficient to meet the inquiry arising on the testimony, though an addition as to that form produced by the absence of will power would be appropriate. *Wharton and Stille Medical Jurisprudence*, p. 38. We think it well to add, too, that on the issue of insanity testimony of the conduct of the accused before and after the act is proper to go to the jury under proper instructions. 2 *Greenleaf on Evidence*, Sec. 371.

While the misuse or abuse of this defence of sanity can not affect the legal principle on which the defence is allowed, we are deeply impressed with the importance of guarding against the failure of justice arising from the frequent interposition without foundation of this defence of insanity characterized in one of the decisions as the last resort of desperate criminals. We have already suggested the charge should be restricted within the scope of the questions fairly arising on the testimony and not extend to forms, real or supposed, of mental disorder, not the subjects of inquiry under the testimony laid before the jury. The charge should be clear and avoid unnecessary qualifications. We think Professor Greenleaf's summary of the essentials of the instruction as to the burden and degree of proof required on the defence of insanity meets substantial requirements. 2 *Greenleaf*, Sec. 373. We think it will suffice if the jury are told in effect that the burden of proof is on the accused to establish by clear and convincing proof the insanity he urges as a defence; that the presumption of sanity is to be taken into consideration and exercise its full influence along with all the testimony before them, whether produced by the accused or by the State; and if on the consideration of the whole testimony, giving due weight to the presumption of sanity, they are satisfied the accused was not of sane mind when the act charged was committed, they are to acquit, but if not thus satis-

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fied they are to hold the accused sane and responsible. With clear instruction as to the presumption of sanity; the burden of disproving it; and that in order to acquit on the ground of insanity the jury must be satisfied of that insanity by clear and convincing proof, it seems to us there should be no convictions of the insane, nor misapprehension by the jury of their duty to hold the accused sane and responsible when not satisfied of the insanity urged in his defence.

For the reasons given in this opinion, it is now ordered, adjudged and decreed that the sentence of the accused be annulled and set aside; that he be again put on trial on the indictment and be held in custody to abide the verdict on the new trial.

CONCURRING OPINION.

WATKINS, J. The defendant was indicted for murder, convicted of manslaughter, and sentenced to imprisonment in the penitentiary for fifteen years, and from that sentence appeals.

Under a plea of not guilty, the defendant sought to prove insanity as a defence, but the jury evidently regarded the proof insufficient.

The principal question argued at the bar and presented in the briefs of counsel on either side is, as to what was the proper instruction for the trial judge to have given to the jury with regard to the degree of proof necessary for them to acquit the defendant on the ground of insanity.

In the course of his written charge, the trial judge, amongst other things, gave to the jury the following instructions substantially, viz.:

That the presumption of sanity "exists with as much force as the presumption of innocence," and that the presumption of sanity can only be overcome by the same degree of proof that is necessary to overcome that of innocence.

That, as the law presumes a man to be innocent until he is proven guilty, if there be a reasonable doubt as to his guilt, the degree of proof as to his guilt does not overcome the presumption of innocence, and he should be acquitted.

The presumption of sanity is a logical parallel to the above rule. Every one is presumed to be sane until he is proven insane. If there is a reasonable doubt as to the man's sanity, the degree of proof as to insanity does not overthrow the presumption of sanity, and the jury should find him sane.

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These two presumptions of law as to innocence and sanity stand upon the same footing.

The burden is upon the State to overcome the presumption of innocence, while the burden is upon the defendant to overcome the presumption of sanity, when insanity is set up as a defence. "Both presumptions should be overcome beyond a reasonable doubt."

To these instructions, defendant's counsel excepted on the ground that same were contradictory and conflicting, and reserved a bill of exceptions thereto.

An examination of a large number of decisions of the courts of different States, as well as those of the courts of England, shows that there are three distinct and well-defined theories on the subject, viz.:

First—That the proof administered must satisfy the minds of the jury beyond a reasonable doubt that the defendant was insane at the time of the commission of the act.

Second—That the burden of proof is upon the defendant to show, by a fair preponderance of evidence, that he was incapable of distinguishing right from wrong, and, consequently, insane.

Third—That if, upon the whole of the evidence adduced, that by the prosecution as well as that by the defendant, there is left in the minds of the jury a doubt as to the sanity of the accused, it is their duty to resolve that doubt in favor of the defendant, and acquit him.

We will make an examination and analysis of the authorities on each theory separately, and by that means ascertain in favor of which one they preponderate.

I.

On this theory the leading American authority is *State vs. Spencer*, 1 Zabriskie (26 N. J.), 196, and we make the following quotation therefrom, viz.:

"When the evidence of the insanity on the one side, and of sanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his sanity, then a man is considered sane, and responsible for what he does."

Again:

"Proof of insanity at the time of committing the act ought to be so clear and satisfactory, in order to acquit him on the ground of

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insanity, as the proof of committing the act ought to be, in order to find the sane man guilty."

Again:

"If, in your opinion, it is clearly proved that the prisoner at the bar, at the time of the homicide, was unconscious that what he did was wrong, and that he ought not to do it, you must acquit him on the ground of insanity; but if, in your opinion, this is not established beyond a reasonable doubt, then you must find him guilty of the act and proceed to investigate the nature of the homicide."

This case has been quoted and followed by several of the courts of other States, particularly in the following, viz.: State vs. Thompson, 1 Houston (Del.), 511; Hodge vs. State, 26 Florida, 11; State vs. Crawford, 11 Kansas, 82; Ballard vs. The State, 19 Nebraska, 609; Wright vs. People, 4 Nebraska, 407; Faulkner vs. Territory, 30 Pacific Rep. (N. M.) 905; State vs. McIntosh, 39 S. O. 97; State vs. Patterson, 45 Vermont, 308; Revoir vs. State, 82 Wisconsin, 295; Miller vs. State, 8 Wyoming, 667.

It will be observed that this theory has found favor in but comparatively few of the States.

II.

On the second theory, those first in importance are the decisions of the English courts, and to illustrate we have made extracts from the following cases, viz.:

From Regina vs. Stokes, 3 Car. and K. 180, we make the following selection, viz.:

"If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him, and the jury must be satisfied that he actually was insane. If the matter is left in doubt it will be their duty to convict him, for every man must be presumed to be responsible for his own acts until the contrary is clearly shown."

So in Regina vs. Layton, 4 Cox C. C. 149, the court said that the question for the jury was, not whether the person was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind.

McNaghton's case, 10 Cl. and Fin. 200, wherein the defendant was discharged by a jury as not guilty of murder, "on the ground of

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insanity," having created considerable discussion, was brought to the attention of the House of Lords, and the judges were summoned to give their opinions on the question of insane delusions giving immunity for acts punishable criminally, and Lord Chief Justice Tindall, speaking for the court, said, that the jury should be instructed that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing," etc.

That case has been frequently cited in the decisions, English and American, and is often quoted with favor by text writers, in treating of the subject of insanity.

Dr. Wharton, in his treatise on criminal evidence, cites the case of *State vs. Spencer*, 21 N. J. L. 196—the leading case in favor of the first theory we have outlined—and several leading English cases, and *McNaghton's* case among the number, as the representative of the second theory; and then he supplements the statement with the observation that the theory once entertained by the English courts has been so far modified that the rule announced in *McNaghton's* case, that the jury is to be governed by the preponderance of evidence, is the prevalent opinion in England. *Whar. Crim. Ev.*, Secs. 337, 338.

But the modification of the theory is very readily observed by comparing the opinion of the judge in *McNaghten's* case with that of Lord Mansfield in *Billingham's* case, cited in *Russell's Treatise of Crimes*, as will be shown in the subjoined extract, viz.:

"In *Billingham's* case, who was tried for the murder of Mr. Percival, a part of the prisoner's defence was insanity; and upon this part of the case, Mansfield, C. J., stated to the jury, that in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt that, at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and there was no other proof of insanity which would excuse murder, or any other crime," etc. 1 *Russell on Crimes* (7th Ed.), 16, 17.

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Mr. Wharton adopts the modified theory as being more consonant with reason and justice, and says, "by the common law, every man is presumed to be sane until the contrary is proved; and the better opinion is, that when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it on whom lies the burden of proof." Wharton on Homicide (2d Ed.), Sec. 665.

Mr. Greenleaf states the rule in somewhat similar terms, thus:

"In all such cases the jury are to be told that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing," etc. 2 Greenleaf on Ev., Sec. 373.

In the recent treatise of Rice on the law of criminal evidence, in discussing the plea of insanity, he says:

"After careful review of the various judicial *dicta*, we are inclined to recommend the instructions contained in the case of Baldwin vs. State, 12 Missouri, 223, which decision is authority for the broad proposition that the defence of insanity is established when the evidence offered in support of it preponderates in favor of the fact, and reasonably satisfies the jury that it existed at the time the criminal act charged was committed." 3 Rice on Ev., Sec. 396.

That author cites the case of Boswell vs. State, 63 Ala. 307, in which it was held that "insanity is a defence which must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal." *Ibid.*, Sec. 399.

The author then observes that "the adjudged cases in this country present a vast weight of authority favorable to the doctrine of Boswell's case; or at least in repudiating the rule entitling a defendant to an acquittal upon the existence of a mere reasonable doubt of his sanity."

The expressions of some of the State courts, to whose opinions we invariably turn for information in case of serious doubt and perplexity, may here be quoted with advantage.

Following the later and modified jurisprudence of the courts of

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England, the Massachusetts court in *Commonwealth vs. Rogers*, 7 Metcalf, 500, said:

"The ordinary presumption is, that a person is of sound mind until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury, either out of the evidence offered by the prosecutor to establish the cause against the accused, or from the distinct evidence offered on his part; in either case it must be sufficient to establish the fact of insanity, otherwise the presumption must stand."

In *Commonwealth vs. Eddy*, 7 Gray, 583, the same court said:

"But it is a presumption of law, that all men are of sane mind; and that presumption of law sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome the presumption of law and shield the defendant from legal responsibility, the burden is on him to prove to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that at the time of committing the homicide, he was not of sane mind."

In *Ortwein vs. Commonwealth*, 76 Penn. St. 414, the court said:

"Insanity must be made to appear on behalf of the defendant; and to be made to appear to the tribunal determining the fact, the evidence of it must be satisfactory and not merely doubtful, as nothing less than *satisfaction* can determine a reasonable mind to believe a fact contrary to the course of nature."

In *State vs. Davis*, 109 North Carolina, 780, the court sustained this instruction of the trial judge, viz.:

"The burden is on the defendant to satisfy the jury, but not beyond a reasonable doubt, that he had not sufficient mental capacity to know right from wrong," etc.

The foregoing *dicta* have been followed and repeated with perfect unanimity and without a single dissent, in the following cases from the States enumerated, viz.: *Persons vs. The State*, 81 Ala. 577; *Ford vs. The State*, 71 Ala. 385; *Gunter vs. The State*, 83 Ala. 96; *Coats vs. State*, 50 Ark. 330; *State vs. Cosat*, 40 Ark. 511; *Balling vs. State*, 54 Ark. 588; *People vs. Bemmerly*, 98 California, 299; *State vs. Trout*, 74 Iowa, 545; *State vs. Jones*, 64 Iowa, 356; *Kiel vs. Commonwealth*, 5 Bush (Ky.), 362; *Moore vs. Commonwealth*, 18 S. W. Rep. (Ky.) 833;

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Ball vs. Commonwealth, 81 Ky. 662; Kailin vs. Commonwealth, 84 Ky. 354; Commonwealth vs. Rogers, 7 Metcalfe (Mass.), 500; State vs. Lawrence, 57 Maine, 574; State vs. Hailey, 34 Minnesota, 430; State vs. Schoffer, 22 S. W. Rep. (Mo.) 447; Loeffner vs. The State, 10 Ohio St. 598; Bond vs. the State, 23 Ohio St. 349; Ortwein vs. Commonwealth, 76 Penn St. 414; Parnell vs. Commonwealth, 86 Penn. St. 260; Lynch vs. Commonwealth, 27 Penn. St. 207; State vs. Vance, 82 North Carolina, 631; State vs. Bundy, 24 South Carolina, 439; State vs. Paulk, 18 South Carolina, 515; Webb vs. State, 9 Texas App. 490; Leach vs. State, 22 Texas App. 279; People vs. Dillon, 8 Utah, 92; State vs. Strouder, 11 West Virginia, 745; Bacagalupo vs. Commonwealth, 33 Gratton (Va.), 807.

The foregoing decisions represent the settled opinions of seventeen States of the Union upon this most important and vital question, and they are in harmony with the present jurisprudence of England.

III.

The leading and most important case which favors the third theory is Davis vs. United States, 160 U. S. 469, a case in which the question of insanity of the accused was examined with great care, and all authorities on the question were reviewed, English as well as American.

That case involved the correctness of the trial judge's charge to the jury, from which we make the following extract, viz.:

"In other words, if the evidence is *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his oath, he is to be treated just as he would be if there were no defence of insanity, or as if there were an entire absence of proof that he was insane.

But it was the contention on the part of the attorney for defendants in error that the true rule is that if the evidence raises a reasonable doubt of the sanity of the defendant, the jury should have been instructed to acquit him—that is to say, if the evidence offered by the defendant raises a doubt of his sanity, the burden is placed upon the prosecution to affirmatively overcome that doubt by proof of his sanity.

In support of this proposition the decisions of the following courts are cited, viz.: Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, New York, Wisconsin and Tennessee—thirteen in number.

The purport of these decisions is that while there is a presumption of defendant's sanity, this only goes to the extent of relieving the State of the burden of proving sanity, and without any proof on the subject the presumption is conclusive; but where proof is adduced establishing a reasonable doubt of his sanity it in effect establishes a reasonable doubt as to whether there was malice in the homicidal act, inasmuch as malice and ill will can not exist in the mind of an insane person.

Accepting this theory as most conformable to the ends of justice, the Supreme Court said:

"If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. His guilt can not be said to have been proved beyond a reasonable doubt—his will and his acts can not be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing the crime, or (which is the same thing) whether he wilfully, deliberately and unlawfully, and of malice aforethought, took the life of the deceased."

The court cites the following cases, from the States above mentioned, as supporting their theory, viz.: *People vs. McCann*, 16 N. Y. 488; *Brotherton vs. People*, 75 N. Y. 159; *O'Connell vs. People*, 87 N. Y. 377; *Walker vs. People*, 88 N. Y. 81; *Chase vs. People*, 31 Ill. 385; *State vs. Bartlett*, 43 N. H. 224; *People vs. Garbill*, 17 Mich. 9; *Dove vs. State*, 3 Hieskill (Tenn.), 491; *Cunningham vs. State*, 56 Miss. 269; *Plake vs. State*, 121 Ind. 433; *People vs. State*, 19 Ind. 170; *Bradley vs. State*, 31 Ind. 492; *McDougal vs. State*, 88 Ind. 24.

And finally they adopted the view expressed by the Supreme Court of the District of Columbia in *Guiteau's case*, 10 Federal Reporter, 161.

It is a fact that is worthy of observation that the Supreme Court cite no other decision of their own as a precedent therefor; and that they refer to no treatise on criminal law as supporting the theory upheld by them. On the contrary, they admit that the jurisprudence of the English courts maintains the correctness of the second proposition *supra*; and that the courts of a great number of the States of the Union do likewise.

Mr. Wharton says of the theory maintained by the Supreme Court in the Davis case:

“This is a modern and strictly American doctrine, and it finds no countenance, as far as I can discover, amongst the best law writers or adjudged cases in England. It seems to be supported by Mr. Bishop, alone, of the American text writers, and finds support in the decisions of only some nine or ten of the highest courts in the several States.” Wharton on Homicide, Sec. 399.

In proof of this assertion, the author cites the greater portion of the decisions referred to by the court in the Davis case, and 2 Bishop's Criminal Law, Sec. 673; and he cites, *contra*, many of the decisions we have referred to on the other side.

IV.

According to our judgment, this court has, in at least two cases, expressed its approval of the *second* theory; but in some opinions of recent date it has adopted the *first*. In so doing, it has pursued an exactly opposite course from that adopted by the English courts, which have changed from the *first* to the *second*; and that of the Supreme Court, which, as a matter of first impression, has chosen the *third* one.

For instance, in *State vs. Burns*, 25 An. 302, the trial judge was requested to charge the doctrine of the Davis case, to the effect “that if they entertained a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they were bound to acquit him;” but on the contrary, the judge charged the jury “that the law presumes the sanity of every man, and that it devolved upon the prisoner, under the plea of insanity, to satisfy the jury by a reasonable preponderance of proof, that he was insane at the time of the commission of the alleged act.”

And this court said: “We think the judge did not err in his charge.

“The true rule is, that the jury are to be told, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and char-

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acter of the act he was doing, or, if he did know it, that he did not know that it was wrong."

In *State vs. Coleman*, 27 An. 691, the charge given to the jury was very nearly the same as that given in the *Burns* case, as will appear from the following, viz.:

"When insanity is pleaded in defence of a criminal act, it must be clearly shown to have existed at the time of the commission of the act;" and "that every person is presumed to be sane until the contrary is proved, and it is for him who sets up this defence to prove it by evidence which will satisfy the minds of the jurors, that the party was insane at the time of the commission of the offence."

And the court said: "This charge was undoubtedly correct."

Upon comparison these two decisions will be found to square exactly with the present jurisprudence of the English courts; and, in criminal matters that jurisprudence is, by positive statutory enactment, made our guide.

The statute provides that "all crimes, offences and misdemeanors shall be taken, intended and construed according to and in conformity with the common law of England; and the forms of indictment, the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes and misdemeanors, changing what ought to be changed, shall be according to the common law, unless otherwise provided." Sec. 33 of Act 50 of 1805, p. 440; Revised Statutes, Sec. 976.

And the force of this rule is strengthened by the provisions of Secs. 993, 994 and 995 of the Revised Statutes, which declare that the plea of insanity raised upon the general issue is one for the jury to determine as an issue of fact; and if same is sustained by proof their verdict shall be not guilty. It is clear, then, that a reasonable doubt of the insanity of the accused would not satisfy "our statute" and the principle of the *Davis* case can not be applied in this State.

The consequence is that in criminal matters this court must follow the decisions of the English courts as the best expression of the common law, in preference to those of the Supreme Court of the United States.

Adopting this as the correct guide it becomes our duty to conform our jurisprudence thereto.

In *State vs. De Rance*, 34 An. 186, our immediate predecessor, as already intimated, receded from the position assumed in the *Burns* and *Coleman* cases, and upheld the *first* theory *supra*.

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That decision has been quoted as authority only once by this court as at present constituted; and then it was merely cited without discussion in an uncontested case. *State vs. Clements*, 47 An. 1088.

Finding that decision—*State vs. De Rance*—unsupported by the current and weight of American authority, and not in keeping with the English jurisprudence, I think it the duty of this court to formally and in terms overrule it, and adhere to the theory maintained in *State vs. Burns* and *State vs. Coleman*.

My examination of the decisions cited in the *De Rance* case does not impress my mind as they seem to have impressed those of our predecessors.

In the first place, the Supreme Court of New Jersey, in a case of much more recent date than that of *State vs. Spencer*, has most distinctly aligned itself upon the *second* theory, as will appear from *Graves vs. State*, 45 New Jersey, 203—decided in 1883, whereas the *Spencer* case was decided in 1846—in which the court say:

"And indeed, so far as experience or tradition extends, it has been the invariable course to instruct the jury that the law, *prima facie*, presumes mental sanity; and that when, in a given case, the prisoner would overcome such presumption, he must exhibit a clear preponderance of proof in favor of such defence."

That this change in the course of decision by that court is conspicuous, appears from the fact that it has been noted and commented upon by Mr. Wharton. 1 Wharton Crim. Law, Sec. 6 and note; Wharton Crim. Ev., Secs. 729, 836.

This change must have an important influence upon courts which have conformed their opinions to that theory, and indeed this has been done, especially by the South Carolina court.

Aligning the authorities cited in *De Rance's* case, I find, by making a comparison with the foregoing lists of cases which I have examined and cited, that all save one—*State vs. Spencer*, 1 Zabriskie (N. J.), 202—are to be classed as favoring either the *second* or *third* theory *supra*, and not the *first*, to which category the opinion assigned them.

Indeed, I find in the quotations selected by the court such expressions as "must be clearly proved," "on whom lies the burden of proof," "governed by the preponderance of testimony," "clear and satisfactory," "will satisfy the jury," "to the satisfaction of the jury," "must be satisfactory," and the like, but there is not

found in any of them the statement that insanity must be proven *beyond a reasonable doubt* (pp. 188, 189).

And yet the opinion undertakes to say, upon the faith of those authorities, that "the burden of proof on this plea rests upon the defence urging it, and its truth must be established beyond a reasonable doubt" (p. 190, citing 27 An. 692).

On the application for rehearing an additional opinion was rendered refusing it, but there was no additional authority cited, the apparent effort being to reconcile the various expressions we have quoted with that of "*beyond a reasonable doubt*"—that is, to demonstrate that they are one and the same thing. The conclusion is irresistible, then, that if they are not one and the same thing that opinion is wrong, and I have shown most conclusively by *all* authorities I have cited that they are totally different and irreconcilable altogether.

Not only is that the case, but in the year 1893, the year subsequent to that in which the decision of De Rance's case was rendered, the very decision of the court upon which it mainly depends was altogether changed. 45 N. J. 203.

It follows as a necessary consequence, that the instructions given by the trial judge to the jury were inconsistent and conflicting, and gave the accused just ground of complaint; but that was not the fault or mistake of our learned brother of the District Court, who merely conformed his views to those expressed by this court in the De Rance case.

DISSENTING OPINION.

BREAUX, J. Under the common law every man is presumed sane until the contrary be proven.

Insanity, as a plea, should be proved as a substantive fact by the accused on whom the burden of proof rests.

Being of the opinion that the proof of insanity at the time of committing the act ought to be made as clear and satisfactory by the accused, to secure his acquittal on the ground of insanity, as the proof of committing the act ought to be made evident by the State in order to find a sane man guilty, I respectfully dissent.

The foregoing rule is the English rule, announced by Mr. Wharton in his work on homicide.

State vs. Edmunds.

No. 12,838.

STATE OF LOUISIANA VS. WILLIS EDMUNDS.

In charging an intent to murder, it is not required to set out the essential descriptions of the crime of murder. It is sufficient that the intent be charged as wilfully, feloniously and with malice aforethought. Where the weapon used is a club, in describing its use, it is not open to objection that the indictment charged an assault with it.

Section 70 R. S. described two offences.

The charging the same in separate counts in the indictment is not duplicity. Where the second offence, the attempt to perpetrate, or in the perpetration of arson, rape, etc., and the intent to murder by stabbing, thrusting, etc., with a dangerous weapon, are sufficiently charged, there can be no reasonable objection to a description of the offence by lying in wait. The two offences can be committed at the same time by one act, and are so closely allied that it may be necessary to meet the evidence, to describe the latter offence as having been committed while "lying in wait."

When a statute forbids several acts enumerated disjunctively and punishes them alike, their commission may usually be charged in one count. *State vs. Romus*, 48 An. 561; *State vs. Samuels*, 39 An. 457.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Terrebonne. *Caillouet, J.*

M. J. Cunningham, Attorney General, *L. C. Moise*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

B. F. Winchester and *H. M. Wallis, Jr.*, for Defendant, Appellant.

Submitted on briefs December 5, 1896.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by
McENERY, J. The defendant was indicted upon two counts. First, lying in wait to commit the crime of murder; second, lying in wait to commit the crime of murder in the perpetration, or attempt to perpetrate, the crime of rape. The jury returned a verdict of guilty. The prosecuting attorney entered a *nolle prosequi* as to the first count, and the defendant was sentenced to the death penalty under the second.

He filed a motion to quash the indictment, as follows:

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(1) That the indictment does not charge him with having committed any offence known to the laws of this State; (2) that the indictment is fatally defective for duplicity; (3) that in the first count defendant is charged with an assault and battery with a dangerous weapon, which are alleged disjunctively with intent to commit murder, not alleging the constituent parts and requirements of murder exacted by the common law of this State; (4) that in the second count defendant is accused of an assault and battery with the intent to commit the crime of murder, without defining the crime of murder, and whilst in the perpetration, or attempt to perpetrate the crime of rape, which is unknown to the criminal statutes of the State of Louisiana; (5) that the indictment is vague and indefinite.

He also filed a motion for a new trial.

There are two counts in the indictment for offences denounced by the same statute, the penalty being the same for each offence. There was no duplicity in the indictment. *State vs. Pierre*, 38 An. 91; *State vs. Cook*, 30 An. 145.

The first count charges the assault and battery upon the prosecutrix, but this is implied in the offence charged, and the charging of it is descriptive of the offence, and was an ingredient of it. *State vs. Taylor*, 35 An. 835.

The intent to murder is the gist of the offence.

The intent is sufficiently and properly charged in the words, with the intent, wilfully and feloniously, and of malice aforethought, to commit the crime of murder in and upon the said Elira Pelligrin. *State vs. Washington*, 48 An.; *State vs. Frances*, 36 An. 336.

The second count is constructed like the first, with the exception of charging the perpetration and the attempt to perpetrate the crime of rape. The crime of rape is sufficiently described and set forth. To this there is no complaint. The intent to commit the crime of murder, while in the perpetration and attempt to perpetrate the crime of rape, is the offence denounced by the statute. The intent to commit murder is described as in the first count.

In the case of *State vs. Frank Brown*, 21 An. 347, the indictment charged: "That one Frank Brown, late of the parish of Orleans, on the twentieth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, with force and arms, in the parish of Orleans aforesaid, and within the jurisdiction of the First District Court for the parish of Orleans, did, with a dangerous weapon, to-wit, a knife, and with the intent to commit the crime of murder,

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and while in the perpetration of the crime of robbery, stab and thrust one Ellen Elliott, contrary to the form of the statute," etc. In this case it was held that the crime of stabbing with a dangerous weapon and with intent to murder was sufficiently described. *State vs. Philbin*, 38 An. 964; *State vs. Williams*, 38 An. 371.

The statute contains the designation of several offences, disjunctively recited. The offences may be charged in the same count in the indictment, as they are cumulative offences denounced by the same statute. Hence the lying in wait charged in the second count is not objectionable. *State vs. Markham*, 15 An. 498.

The charge constituted only one offence. 31 Cal. 416; 18 Fed. Rep. 901; 9 L. R. A. note, p. 182; *Herman vs. People*, 131 Ill. 594.

There is nothing in the record that could justify us in disturbing the ruling of the trial judge on the application for a change of *venue*. There is no evidence brought to our notice by a bill of exception. *State vs. Daniel*, 31 An. 91.

Objection is made in the motion for a new trial that the defendant was forced to trial immediately after counsel had been assigned him. There was no bill of exception taken to the ruling of the trial judge. He says, in overruling the motion for a new trial, that "on the day fixed for trial the accused went to trial without objection, being urged then and there, and without suggesting to the court that he had no time to summon his witnesses in the case; nor was any request made for further time to prepare a defence, nor a continuance asked for any cause."

The other matters in the motion for a new trial are unaccompanied by evidence, and we can take no notice of them.

Judgment affirmed.

No. 12,336.

JAMES E. BESSON ET ALS. VS. THE MAYOR AND COMMON COUNCIL OF DONALDSONVILLE.

Interveners in an action of slander of title, having joined the plaintiff for the purpose of making common cause in resisting the claims of the defendant, and its attempt to sell the property in controversy *pendente lite*, but at the same time setting up title in themselves adverse to that of the plaintiff, can not be said to have adopted the allegations of the plaintiff's petition, and bound themselves by a judicial estoppel precluding them from bringing a new suit adversely thereto.

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A PPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guton, J.*

R. N. Sims for Plaintiffs, Appellants.

E. N. Pugh for Defendants, Appellees.

Argued and submitted January 6, 1897.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by

WATKINS, J. This is an action of slander of title or jactitation, the plaintiffs alleging ownership and possession of the property in controversy, and averring that the defendant, out of possession, is asserting title thereto to their prejudice and injury. *Havard vs. Atkins*, 24 An. 511; 2 Hennen's Digest, p. 1439.

Averring further that the defendant had advertised said property for sale, they coupled with their petition a prayer for a writ of injunction to issue, restraining same, and which accordingly issued.

To this suit the defendant filed a peremptory exception and plea in bar of plaintiffs' right of action, predicated upon prior judicial proceedings to which they were parties; and same having been sustained and the suit dismissed, the plaintiffs have appealed.

The only evidence introduced in the court below on the trial of the exception and plea of estoppel was the record of the suit entitled *Leon Godchaux vs. Mayor and Common Council of Donaldsonville*, bearing docket No. 840 in the District Court of the parish of Ascension—the same court from which this appeal is brought up—"and all the papers contained therein," and "the minutes of court showing the proceedings taken in open court in (same) and the different exceptions in (that) suit and the dates of their filing."

There appear in the transcript certain interrogatories on facts and articles and the answers thereto, as well as the answer of the defendant; but, manifestly, they have no pertinence to the exception, and we will therefore dismiss them from further consideration.

The plaintiffs sue in the capacity of legal co-heirs of Joseph and Celestine Besson, deceased, and allege that their paternal grand-

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father, Jacques E. Besson, acquired at a sheriff's sale made on the 19th of May, 1820, "a certain parcel of land situated in the city of Donaldsonville, fronting on the Mississippi river, and on Cabahannasse street (now called Railroad avenue), marked No. 2, on the plan of said town, containing such front and depth as to the same then belonged, and all the right, title and interest or demand which the estate of William Donaldson had in and to said lot or parcel of land, on the 14th of April, 1820."

"That at the time of said sale (on the) 19th of May, 1820, said parcel of land so conveyed to petitioner's grandfather *fronted on the Mississippi river, nothing intervening between it and said river but the passage-way or street and the levee*. That by said sale said Jacques E. Besson acquired said parcel of land described in said deed *with the right to every and all accretion or accessions which might thereafter be formed in front thereof by alluvial deposits of said river;*" and that, immediately after said sale to him, said purchaser went into actual possession of said property, and remained in possession thereof uninterruptedly, up to the year 1860. That during the year 1860, petitioners' father, Joseph Besson, in certain partition proceedings amongst the heirs of Jacques E. Besson, aforesaid, deceased, of the property of his estate, "acquired all of the right, title and interest of said succession, and of his (Joseph Besson's) co-heirs in and to the parcel of land" sold at the aforesaid sheriff's sale *"with all the rights of accretion thereto appertaining;* and that they derive title by inheritance through him and his wife, their father and mother."

Petitioners allege that "subsequent to the year 1820, there began to form in front of said parcel of land, a batture or accretion from the deposits of river sand, during high water; that said formation was slow and gradual, and at the time of their (father's acquisition) of said lot or parcel of land, the batture did not extend more than one hundred feet from the levee in front of said lot to the water's edge at the low stage of the river. That from 1860 to 1870, there was considerable accretion in front of said property, said batture being further extended toward the river and raised by deposits of river sand during high water in said river." That at the time Jacques E. Besson acquired said lot or parcel of land in 1820, the levee ran along Mississippi street, on the river side thereof, directly in front of said land, and said levee

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formed the river bank, there being at the time no intervening batture, formed by accretion or otherwise, between said levee and the river. "That said levee remained in the same position in front of that portion of the town from 1820 to about two years since, when it was replaced by a new line of levee, constructed at a distance of about two hundred feet further out toward the river. *That prior to the construction of said new levee, the batture in front of said lot or parcel of land No. 2 was covered with water from two to four feet * * during the high stage of the river, but the same remained exposed and was high above the level of the river at its low stage during the fall and winter months of the year.*"

Petitioners then aver that on the 6th of March, 1871, their said father, Joseph Besson, conveyed to his daughter, Felice Besson, one of petitioners, a certain lot of ground situated in the city of Donaldsonville, "at the corner of Mississippi and Cabahanosse streets, designated as lot No. 2 on the official plan of said city," measuring sixty feet * * * *front on Mississippi street* by one hundred and twenty feet * * * *on Cabahanosse street*, together with all the rights, ways, etc., thereto appertaining; but that their father *did not convey nor divest himself of his right, title and interest in and to the said batture or secretion in front of said parcel or lot of land described in said act,*" but that, on the contrary, he "*retained his ownership and possession, until his death, of said batture property, which at the time of said sale in 1871, he had uninterruptedly held as owner and possessed under said partition proceedings as an heir of the succession of his father, Jacques E. Besson.*"

They "further show that no one now disputes their rights of ownership and possession of said batture or accretion in front of said lot or parcel of land No. 2, as the children and lawful heirs of their deceased father * * * except the municipal authorities of the town of Donaldsonville, who have recently, without any legal right or warrant whatsoever, slandered the title of petitioner to said batture or accretion by claiming the same as the property of the town of Donaldsonville, and advertising same for sale," etc.

Petitioner further avers "*that since the building of the new levee in front of said town on the river, a strip of batture or accretion in front of said lot No. 2, corner of Mississippi street and Railroad avenue (formerly Cabahanosse street) measuring about sixty feet in width, by a depth of about two hundred and fifty feet toward the river,*

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is protected by said levee, and (that same) is no longer subject to be overflowed during high water, and has become valuable property;" and that (they) are entitled to be quieted in the possession and enjoyment thereof; and that it is worth more than two thousand dollars.

The prayer of the petition conforms to the foregoing extracts from the averments thereof, and it particularly demands that the defendant be enjoined and restrained from "selling the *strip of land or accretion in front of said lot No. 2, corner of Mississippi street and Railroad avenue* (formerly Cabahanosse street), in Donaldsonville, belonging to your petitioners;" and it demands further that they "be quieted in their ownership and possession of all the said lands in front of said lot or parcel of land No. 2 on the plan of said town," etc.

The italicized portions of the foregoing extracts from the petition in this suit will more readily direct attention to the *gravamen* of the suit, and render comparison between it and the petition in the former suit, relied upon as supporting defendant's exception, more convenient and easy.

Reduced to a last analysis, this suit has for its object to maintain the plaintiffs in the joint possession and ownership of an alleged batture formation between Mississippi street, in the city of Donaldsonville, and the Mississippi river, on the ground that same has been created from the accretions of river sand occasioned by annual swells of the Mississippi river through a long series of years, since the acquisition of the land adjacent in the year 1820 by their grandfather, and that neither their father nor their grandfather ever disposed of same to any one, and it had consequently passed to them by their right of inheritance as legal and forced heirs.

The defendant's peremptory exception is of the following tenor and purport, viz.:

That the plaintiffs "are estopped and debarred" from any further proceeding in this suit, for the reason that they filed a petition of intervention in the suit of Godchaux vs. Mayor, No. 840, "and adopted the pleadings of said Godchaux and joined him in said suit, and were represented by the same attorney;" and that they "are bound by all the judicial admissions made by said Godchaux in said suit No. 840, touching the subject matter of the present controversy. That in said suit No. 840 it was distinctly and affirmatively alleged that in 1820, at the time of the sale of lot No. 2 to Jacques E. Besson,

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that a batture existed in front of said lot No. 2, and the ownership of same was claimed by said Godchaux in that suit; and that (that) allegation was necessary and essential to sustain the rights of Godchaux," etc.

That the plaintiffs in this suit "are estopped and should not be heard or allowed to deny, alter or vary their judicial admissions, or shift their position; that having judicially admitted *the existence of a batture in 1820*," and averred that it was not sold to them, "they should not be allowed to allege or prove the contrary."

Referring to the petition of the plaintiff Godchaux in the suit referred to, we find that he makes claim to said lot No. 2, "forming the corner of Mississippi street and Railroad avenue * * * together with all the rights of accretion and accession belonging to and attached to said lot or parcel of ground, including the batture or land now lying in front of said lot or parcel of ground between it and the Mississippi river."

The petition further alleges that he acquired same by purchase at sheriff's sale made in 1880, and derives title thereto through mesne conveyances from Jacques E. Besson, who acquired same in 1820, in executory proceedings against William Donaldson.

Then follows this allegation, viz.:

"That at the time of said sale to Jacques E. Besson in 1820, the levee along the Mississippi river in front of Donaldsonville was situated about fifty or sixty feet from the corner of said lot No. 2, and the batture in front was covered with water during the high stages of the river (and) that said levee remained in (that) position until about two years ago;" and that about that time "the levee in front of (his) said property was removed or reconstructed about two hundred feet further toward the river, thereby leaving in front of (his) said lot or parcel of ground a strip of land sixty feet wide, by about two hundred feet in length, forming the accretion or accession to said lot or parcel of land No. 2, "which belongs to him and is in his possession."

The prayer for relief is very much the same as that in the instant suit.

The present plaintiffs, as intervenors in that suit, show (1) what the substance of Godchaux' claim in that suit was, making the usual allegation, viz.:

"(1) All of which will be seen more fully by reference to the peti-

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tion of said Godchaux, and the record of said suit, hereto annexed as part hereof; (2) they state the nature and origin of the title of Jacques E. Besson, and his acquisition in 1820, of the property in dispute; (3) that of the manner in which their father, Joseph Besson, acquired same; (4) that in which Joseph Besson conveyed to his daughter, Felicie Besson; (5) that in which Felicie Besson conveyed to Henry Loeb, whose title Godchaux expropriated under an act of mortgage, and acquired his title thereto at sheriff's sale.

They then specifically aver that their father, Joseph Besson, did not convey in the deed to his daughter, Felicie, "the batture or accretion belonging to it," and lying between it and the Mississippi river; and, consequently, same did not pass by mesne conveyances to the plaintiff, Godchaux. On the contrary, they distinctly aver, that, as said title to Felicie Besson did not include the batture or accretion, the title thereto remained in their father, and that they, as his legal and forced heirs, including Felicie Besson, acquired same by inheritance at his death.

Their prayer is, that they be allowed to intervene in said suit and join the plaintiff "in asking the court to adjudge and decree the town of Donaldsonville not entitled as owner, or otherwise, to any portion of said batture herein described, and described in plaintiff's petition herein, and to have no right, title or interest in said batture property;" and it concludes with the demand that they "be decreed the owners of said batture, or accretion," etc.

Having carefully, and in detail, recited all the pertinent portions of the petition in this suit, and that of the plaintiff and intervenors in the previous suit, and analyzed them with care, we are unable to perceive the conflict of allegation the defendant's exception implies.

It is quite true that the petition of the intervenors does aver that they join the plaintiff Godchaux; but it is equally true that they restrict that averment to the particular object of making common cause in resisting the demands of the defendant only for the purpose of preventing a sale of the property; and they, at the same time, most distinctly set out their ownership and possession of the batture and accretion, as having been derived by inheritance from their father, Joseph Besson. And their prayer is, that they be adjudged and decreed the joint owners of same, in their capacity as heirs, and maintained in the possession and enjoyment thereof.

These averments and prayers are altogether inconsistent with the

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theory of intervenors having adopted those of the petition and prayer of plaintiff, Godchaux; and it is perfectly evident to our minds that such was not the intention of the intervenors; otherwise than as we have stated.

The intention of the intervenors was to join the plaintiff, Godchaux, and unite with him for the purpose of preventing defendant from making a sale of the property; but this they could do without adopting his averments as to ownership and chain of title.

It would have been inconsistent pleading on the part of the intervenors to have adopted the averments of Godchaux' petition, because each of their claims of ownership depended upon a different state of facts; that of intervenors upon the formation of batture or accretion susceptible of private ownership *since* the purchase by Jacques E. Besson in 1820, which did not pass to Godchaux, while that of Godchaux is that batture was *then in existence*, and passed to Jacques E. Besson by his title, and to him (Godchaux) by mesne conveyances.

In the former suit the defendant filed peremptory exceptions to the petitions of the plaintiff and of the intervenors, and the judge *quo* made this ruling, viz.:

"I agree with defendant's counsel, that as plaintiff has no right to stand in judgment for the property, and this proposition must be assumed to be true—since the same counsel who represents him (Godchaux) also represents the intervenors, who now claim the property—he can not ask a judgment in his favor, so that his suit must be dismissed.

"The dismissal of plaintiff's suit carries with it the dismissal of the intervention, *leaving to intervenors the right to proceed by separate suit.*" (Our italics.) A like decree follows. *Barron vs. Jacobs*, 38 An. 371; *Meyers vs. Birotte*, 41 An. 746.

The injunction of the plaintiff was thereupon dissolved and the suit dismissed. Just here arises the question: Why did the judge *quo*, having the two petitions before him, *reserve to the intervenors the right to renew the demands in a separate suit*, if, in fact, they were conclusively bound by the judicial declarations of Godchaux upon which he had no standing in court?

It may be, and doubtless was, because that theory was not then developed by the defendant's counsel, or he would have done so, entertaining the view he expressed by his decree in this case. But on the theory we have outlined with regard to the intervenors not

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having adopted the allegations of Godchaux' petition, we deem his prior ruling perfectly consistent. But conceding, for the argument, that the question is in doubt, that doubt must be resolved in favor of the plaintiffs and against the exceptors; for estoppels are not favored in law. This question should, if possible, be judicially settled and definitively put at rest, particularly as the property in dispute is a riparian lot in a flourishing inland city on the shore of the Mississippi river, to the public authorities and citizens of which a settlement of the question may be of great importance, either presently or prospectively.

For these reasons we think the judgment appealed from should be reversed.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the cause be remanded to the lower court to be therein proceeded with according to law—the cost of appeal to be taxed against the defendant and appellee, and other costs to await the final judgment in the cause.

No. 12,338.

SUCCESSION OF JAMES TELLER.

The usufruct of the surviving spouse of the share of the deceased spouse in the community property is not affected by the fact that there is an adopted child of the spouses, surviving the deceased. U. C., Arts. 915, 916; R. S., Sec. —.

A PPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

E. N. Pugh for Executrix, Plaintiff, Appellee.

Paul Leche, Special Tutor, Defendant, Appellant.

Argued and submitted January 6, 1897.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by

MILLER, J. The appellant, the tutor of the adopted child of the late James Teller, takes this appeal from the judgment recognizing

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his widow as the usufructuary of the community property not disposed of by his last will.

The question raised by the appeal is whether the child by adoption is exempted from the operation of the Arts. 915 and 916 of our Code embodying the Act of 1844, which confers on the surviving spouse the usufruct of the community property which the deceased has not disposed of by his will. The spirit and text of the law is against the pretensions of the tutor. The purpose was unless the deceased spouse disposed of his share of the community, to preserve intact the community property to be enjoyed by the surviving spouse during his or her natural life or widowhood, when there were children of the marriage. Revised Statutes, Secs. 627, 628, and the articles of the Code cited. There was no design to interfere in the least degree with this community usufruct when the Legislature, first in 1865, and by subsequent enactments, authorized adoption abolished by the Code, as it then stood. Act No. 48 of 1865 and No. 64 of 1868; R. S. 2323-2328. The effect of this legislation conferring on the adopted child the rights of the child of the marriage, has been announced in the decisions of this court. *Vidal vs. Commagere*, 13 An. 516; in the matter of the Tutorship of *Ellen Wilson Upton*, 16 An. 176; *Carroll Hoy & Co. vs. Davidson*, 23 An. 431; *Succession of Hosser*, 37 An. 840; *Succession of Unforsake*, 48 An. 548. If the legislation places the adopted child in the position of a child of the marriage with respect to the right of inheritance, it would certainly seem that the child by adoption became subject also to the limitation on the right of inheritance of community property imposed by the Code upon children of the marriage. The child of the marriage inherits the share in the community of his deceased parent subject to the usufructuary right of the surviving parent. If the law confers on the adopted child the right of the child of the marriage, the adopted child inherits community property under precisely the same limitation that attaches to the child of the marriage. Again, the Code establishes this usufruct when there are no children of the marriage, and there is also the usufruct established with qualification when there are children. If the adopted child is to be excluded from the category of children, the usufruct exists under Art. 915; if deemed a child the usufruct subsists under Art. 916 of the Code.

Affirmed.

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No. 12,261.

STATE OF LOUISIANA VS. LEONIDAS PRUETT.

A motion to quash a venire must be filed on the first day of the term. State vs. Collins, 48 An. 1454.

The express statutory grant to a defendant by Act No. 113 of 1836, to have the testimony taken down in writing can not be denied because the exercise of it might be barren of results in the particular case. That fact could only be tested on appeal when the record would come up.

It has been held in this State that threats made by the deceased are only exceptionally admissible in evidence, but when the particular matter being considered through the testimony is not as to justification or mitigation of the homicide, but justification or explanation of the circumstances under which a certain statement by the defendant had been made, the question is not presented under the circumstances which require proof of a prior overt act on part of the deceased. In order to explain such statement (as to which the State had elicited testimony), defendant on the stand as a witness, was entitled to show that threats made by the deceased had been communicated to him.

When an application is made for a change of venue, the court may postpone action on the motion until after an examination on their *voir dire* of the jurors of the panel, but the accused has a right to have it taken up and passed on as a substantive motion after hearing, contradictorily with the State and on evidence adduced in support of the allegations of the same. Am. and Eng. Ency. of Law, Vol. 3, p. 93.

On the trial of such an application, the accused is not, concluded by the answers of the jurors on their *voir dire*. He is entitled to traverse, contradict and disprove these statements. As the condition of a juror's mind, in respect to his being unbiased and impartial, rests entirely upon his own assertion, his declarations on that subject should not close the door to an investigation and examination of facts which would tend to show that the juror either unconsciously or designedly was not stating the truth.

In a criminal suit the State should at once offer on its side all the evidence which it has, and not reserve its real or main attack until after the defendant had closed his case; but this matter must be left in each case to the sound judicial discretion of the court, which having knowledge of the general rule would protect the defendant by enforcing it, unless by reason of some exceptional state of facts.

In ordering the summons of tales jurors the provisions of Sec. 7 of Act No. 99 of 1836 are not to be taken as mandatory, without regard to the facts of any special case. A certain discretion has to be left to the court, to be exercised by it in such manner as that wrong and disadvantages be worked neither to the State nor to the accused.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

B. Lee Garland, District Attorney, for Plaintiff, Appellee.

W. S. Frazee, F. B. Dubuissou, C. F. Garland and John N. Ogden or Defendant, Appellant.

49	283
50	11
50	404
51	239
51	240
51	245
51	440
49	283
52	210
52	449
49	283
114	856
114	859
49	283
115	745
49	283
116	100

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Argued and submitted November 21, 1896.

Rehearing refused January 18, 1897.

STATEMENT OF CASE.

Defendant was indicted for murder, found guilty of manslaughter and sentenced to fifteen years' imprisonment in the State penitentiary. From this verdict and sentence he has appealed, presenting a number of bills of exception for review.

The first bill is reserved to the overruling a motion to quash the indictment, on three grounds; first, because the list or *venire* from which the grand jury was drawn was not published; secondly, because one of the jury commissioners was a deputy United States postmaster in active discharge of his duties as such at the time; thirdly, because another of the jury commissioners was at the time a member of the police jury. The motion was overruled on the ground that it was filed too late; that it did not allege fraud or injury, and because the clerk was right in not publishing the lists after the new law took effect, because of the *proviso* of the repealing clause.

The second bill recites that the defendant filed a motion for a change of venue, which he annexed to his bill; that a day had been fixed for the hearing of the same, notice given and a number of witnesses were summoned by him to prove the allegations thereof; that when it was called for hearing the District Attorney moved that evidence in support of the motion be postponed until after the jury had been examined on its *voir dire* in order to ascertain from that examination whether a fair and impartial trial could be had or not; that defendant objected on the ground that that would be submitting the question to a test not contemplated by law or the pleadings; that the change of *venue* is a constitutional right which should not be lightly dealt with, and that the sanction of the Constitution (Arts. 7 and 158) attaches to the law existing on the subject (Secs. 1022 *et seq.*, Revised Statute-), which declares that the motion for a change of *venue* shall be made in open court or by petition at chambers, and that the judge should award the change if after hearing contradictorily with the State's representative and "an examination of the evidence adduced," he should be of the opinion that the party applying could not have a fair and impartial trial in

the parish wherein the indictment was pending; that therefore the statute contemplated the hearing of evidence contradictorily; that the judge overruled the motion in a written opinion, which defendant annexed to his bill; and that to this ruling defendant reserved and tendered a bill of exceptions.

The third bill recites that after the judge presiding had ordered that the *venue* of jurors be examined on their "*voir dire*," prior to taking up defendant's motion for a change of *venue*, as detailed in bill of exception No. 2, the judge, on the examination of the jurors, would not permit defendant to question the jurors on the lines laid down in said motion, or as to the truth or falsity of the averments thereof, nor would he permit the said jurors to be questioned as to the political party to which they belonged during the last political campaign in the parish, as to the feelings and prejudices aroused, between the contending parties, nor as to whether the jurors entertained those feelings and prejudices, all of which would appear by reference to the examination of said jurors, which was reduced to writing and was annexed to the bill and made part thereof for explanation and certainty; that after the examination of the jurors on their *voir dire*, limited and circumscribed as it was, defendant urged that that examination was no test of whether he could obtain a fair trial in the parish under the condition of things charged in the motion for a change of *venue*. Defendant, therefore, moved to have his witnesses heard for the purpose of proving the averments of his motion, which he desired to have taken up, and for the purpose of rebutting the inference that could be drawn from the said examination of said jurors, that he could obtain a fair and impartial trial in the parish, if any such inference there was; that the examination of the jurors did not touch upon the main facts set up in the motion for a change of *venue*, and that the action of the court was the denial of a constitutional right, without a hearing and without due process of law; that the court overruled defendant in all his objections, questions and contentions and ordered the jury to be empaneled, which was accomplished after the examination of a large number of talesmen.

The court's action was based upon reasons assigned which need not here be stated. A large part of defendant's bill, and of the judge's reasons, are made up of "arguments" to sustain the position which the defendant and the judge respectively took, and are here omitted.

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The fourth bill states that on the day the case was fixed for trial (September 14) defendant applied for and obtained compulsory process for the attendance of Charles Medici, a material witness for defence, who was living at the time in the parish of Ascension; that on the day fixed for trial (September 17) the District Attorney called the case for trial. Whereupon defendant announced that he was not ready for trial, because of the absence of said Medici, and because no return had been made upon said process; that the letter of the sheriff of Ascension to the clerk of court, annexed to the bill, which was filed September, 17, 1896, and dated September 16, 1896, shows that the sheriff had made no effort to serve said process; that defendant, for said reasons, objected to going to trial; that thereafter he filed a written motion (annexed to the bill) asking for additional compulsory process or *alias* subpoena, to have the same served on Medici and proper return made, and asked for sufficient delay for said purpose, all of which was refused by the court for the reason that the State stood ready to admit, and did admit, that if the witness was present he would testify as stated in the affidavit for the process which was done under the provisions of Act No. 84 of 1894.

The fifth bill states that on the 18th September, 1896, defendant filed a motion for a continuance (annexed to the bill), which the court refused for the reason that the State agreed to admit, and did admit, that if the witness (Medici) was present he would testify as stated in the affidavit for the continuance agreeably to Act 84 of 1894.

The eighth bill recites that one Cahanin being on the stand as a witness to prove express malice, said witness swore, first, that defendant Pruett told him on the morning of the homicide "he was going to kill or would kill the deceased," and on cross-examination modified said statement by saying that defendant said "he would have to kill the deceased." That thereupon Pruett, the defendant, was put upon the stand in his own behalf, and having related the conversation he had with Cahanin, was further asked: "State to the jury and detail any occurrences that may have taken place between you and Sandoz (the deceased) in order to explain the remark made by you to Cahanin," but that the question was ruled out by the court for the following reason, viz.: The court permitted the witness to fully explain all the reasons he had for telling Cahanin that he would have to kill the deceased. The court expressly stated that the State could prove the threat, but the defendant had the

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right to explain why the remark was made by the witness. What the court ruled out was this: That defendant had no right to go into details of previous quarrels and difficulties in order to prove who was right and who was wrong. To which ruling defendant excepted and further excepted to the reasons given by the court, because at the time the question was asked Pruett had only stated the conversation with Cahain which showed a quarrel between them, and because he had a right to detail the quarrel or quarrels in order to show the dangerous and serious character of the same in order that the jury might understand why he made said remark and not draw any unfair inference therefrom, and also excepted to said reasons, because said Pruett had not given all of his reasons for making said remark, which objections to said reasons were also overruled by the court, because Pruett was permitted to go into details of quarrels had with deceased and was permitted to state everything which had occurred between them and deceased at these quarrels, but the court would not permit him to recite threats which had been communicated to him previous to the killing for the reason that at the time of the killing no overt act or hostile demonstration on the part of said deceased had in the court's opinion been shown to exist. To which rulings defendant excepted and tendered a bill.

Bill number nine states that on the trial of the above cause, and after defendant had introduced evidence as to the overt act, the court was asked for time within which defendant could draw up a written motion, asking the court to allow evidence of previous threats and provocation and to reduce the evidence as to the overt act to writing, in case the court should not agree with defendant that an overt act, on the part of Sandoz, deceased, had been proved; that this application was refused, the court assigning as its reason that in *State vs. Christian*, 44 An. 954, the Supreme Court had declared that whether or not a foundation had been laid for the introduction of the dangerous character of the deceased is a matter to be decided by the trial court, whose ruling in such matter would not be reversed, unless manifestly erroneous (*State vs. Barker*, 46 An. 796); until a feasible method had been devised to bring up for review on appeal all testimony—(that on behalf of the accused to prove and that of the State to disprove the overt act), the court would follow established precedents.

The tenth bill states that defendant, having introduced the testi-

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mony of himself, his daughter, Thomas R. Carroll, J. B. Donato and other witnesses, [whose evidence he considered and declared proved that Sandoz, deceased, had attempted to shoot before he (Sandoz) was shot], offered the evidence of Charles Medici, as appears in motion for continuance (annexed and made part of the bill) and which counsel for the State admitted (in order to force a trial), that said Medici would swear to if present; that this evidence was ruled out by the court upon the ground that the overt act had not been proved; that defendant excepted to this ruling and reserved a bill; that counsel for defence differed from the court as to whether the overt act had or had not been proved, moved orally (the court having previously refused to allow time for a written motion) that the evidence on the question of the overt act be taken down in writing in order that the same might be annexed to the said bill of exception, to the end that the Supreme Court might decide whether there was sufficient proof of the overt act to justify the admission of the evidence of Medici and other like evidence; that counsel contended that the overt act, on part of deceased, had deprived him of evidence which, taken with the evidence of the overt act, would have acquitted him, and contended further that the question of the overt act was a mixed question of law and fact, and should, therefore, be reduced to writing.

Appended to the bill the judge stated that in the opinion of the court no hostile act nor hostile demonstration had been shown; that, on the contrary, it was established, beyond cavil, that accused had long before deceased neared his house (that of accused) gone into the same, procured his rifle, which he pointed through the half door of his house until his victim reached a point just opposite, when the accused fired upon the deceased, the shot from which he died; that "the question of overt act or hostile demonstration was addressed to the discretion of the trial judge, and that there was no law which authorized the taking of testimony *vel non* for review by the Supreme Court."

The eleventh bill states that defendant moved the court to reduce to writing the evidence of the witnesses, Aline Pruett, Johny Savant, Joseph Boudreau, J. B. G. Donato and others, on the question of establishing the overt act; these witnesses having testified on this matter, and there being a difference of opinion between court and counsel for the accused, as to what constituted an overt act or hostile

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demonstration, and whether such act or demonstration had been made by the deceased; that this request was made for the purpose of enabling the appellate court to properly pass upon the ruling of the lower court in excluding proofs of previous difficulties and communicated threats. The court stated it overruled the motion for the reasons assigned in bills of exception Nos. 9 and 10.

The twelfth bill states that on the trial of the case, after the State had offered its evidence and the defence had closed its case, counsel for the State called one Alfred Johnson, who, after saying he was an eye-witness of the homicide, was asked by counsel for the State: "State what you said and what happened?" that counsel for defendant objected, because it was evidence the State should have offered originally in making out its case, and because under the law only evidence strictly in rebuttal was permissible at said stage of the proceedings; that the question was one that called for and elicited a statement of facts on the whole case. The court overruled the objection, assigning as its reason that the evidence was offered in rebuttal of the prisoner's evidence; that the State had announced that the evidence would be to this effect and it proved to be absolutely so.

The fourteenth bill states that on the 18th September defendant filed the written motion, annexed to the bill, asking that *tales* jurors be not summoned within the corporate limits of the town of Opelousas; that the motion was overruled. The court assigned as the reason for its action that it knew of no law that would warrant such a mode of procedure; that Sec. 7 of Act No. 99 of 1896 directs the manner in which *tales* jurors should be summoned and the court complied with its requirements.

The opinion of the court was delivered by

NICHOLLS, C. J. The action of the court in overruling defendant's motion to quash the indictment was not erroneous. The motion was made too late. The facts disclosed by the evidence adduced bring the present case within the doctrine announced in *State vs. Collins*, 48 An. 1454. The jury drawn in this case was through the *proviso* of the repealing clause of Act No. 99 of 1896, withdrawn from the provisions of the fifth section of that act requiring publication.

The ninth, tenth and eleventh bills of exception reserved by de-

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fendant are the first which we take up. From them it appears that after he had introduced the testimony of himself, his daughter, Thomas R. Carroll, J. S. Donato and others, whose evidence he declared proved that Sandoz (the deceased) had attempted to shoot before he (Sandoz) was shot, defendant offered evidence to prove previous threats made by the deceased and provocation, but that said evidence was ruled out by the judge for the reason that no overt act on the part of the deceased had been proved. That defendant moved the court that the evidence on the question of the overt act be taken down in writing in order that the same be annexed to his bills of exception to the end that the Supreme Court might decide whether there was sufficient proof of the overt act to justify the admission of the rejected evidence, but that this application was refused, the court stating that "no overt act had been shown; that the question of overt act or hostile demonstration was addressed to the discretion of the trial judge and that there was no law which authorized the taking of the testimony for review by the Supreme Court."

The court erred. Act No. 118 of 1896 authorized the accused to demand that the testimony be reduced to writing and made it the duty of the court to grant the request. It is possible that had the testimony been taken down the record would not have been placed in such a form as to have enabled us to review the ruling of the lower court; but neither this court nor the District Court are permitted to speculate upon that subject. The express statutory right granted to a defendant by the act can not be denied because the exercise of it might be barren of results in the particular case. That fact could only be tested on appeal when the record would come up.

We are of the opinion that the court erred in refusing, as shown by the eighth bill, to allow defendant when on the stand as a witness to recite threats of the deceased which had been communicated to him, on the ground that at the time of the killing no overt act or hostile demonstration on the part of the deceased had, in the court's opinion, been shown.

The particular connection in which the evidence was sought to be made use of seems to have been overlooked. It has been held in this State that threats made by the deceased are only exceptionally admissible in evidence. Usually prior proof is required of some overt act by the party killed at the time of the homicide to warrant

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the reception of testimony in regard to them, but the question was not presented in this case under the circumstances which required that a prior overt act on the part of the deceased should have been shown before evidence of communicated threats should be admissible. The particular matter then being considered was not evidence as to justification or mitigation of the homicide, but justification or explanation of the circumstances under which a certain statement made by defendant had been made. The parties had turned aside temporarily from the facts directly connected with the homicide at the time of its occurrence to consider an incidental collateral issue concerning evidence upon the trial. The State had shown by Canahan a declaration made by defendant calculated to powerfully impress the jury adversely to accused if left unexplained. The State had opened the door to the inquiry and made it imperatively necessary for defendant to show the exact facts. When it had been testified to that defendant had declared that "he intended to kill the deceased," or "that he would kill him," we think it was perfectly proper for him to explain, if he could, that if he made the statement, it was because he anticipated from threats made by deceased and communicated to him, that he would be forced to kill him in self-defence. A very different coloring would be given to defendant's expression viewed from that standpoint, from that which it would have, if permitted to rest at the point where the State wished to close the inquiry. As a matter of course, defendant in availing himself of an opportunity given him to rebut any prejudicial influence which might result from his declaration, should not be permitted to push his testimony beyond what was legitimate solely for that purpose. There was a limit to his right which the court was authorized to see was not transcended. We must assume, in the absence of any showing, what his testimony had been, or what it was intended to have been, that the court's action (other than that in respect to the excluded testimony as to communicated threats) was justified by the facts.

The exceptions of defendant in the second bill of exceptions and the argument of counsel upon it are much broader than the action of the court, referred to in the bill, called for. As we understand matters, defendant had filed a motion for a change of venue on stated grounds—this motion was fixed for trial—defendant summoned witnesses in support of his motion, who were present in court

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for examination, but upon the application of the District Attorney the hearing of evidence in support of the motion was postponed until after the jury panel had been examined on its *voir dire* in order to ascertain from that examination whether a fair and impartial trial could be had. The bill is argued as if the court had then and there finally cut the defendant off from the right of examining witnesses to sustain his motion. That is not the import of the ruling, which extended only to a temporary postponement of the hearing and to a decision upon the order of proceeding. In so considering it, we find no cause of reversible error. In the Am. and English Ency. of Law, page 99, we find it laid down that where an application is made for a change of venue the court may deny the motion until it can be shown by an examination of a sufficient number of jurors whether a fair and impartial trial can be obtained or not (citing *State vs. Gray*, 8 West. Court Rep., Nevada, 72) * * * that there is no error in postponing the consideration of a motion to change the venue until an attempt is made to impanel a jury (citing *People vs. Plummer*, 9 Cal. 298; *Hunter vs. State*, 43 Ga. 483; *Ward vs. Moorey*, 1 Wash. Ter. 122).

The third bill contains a double complaint, the first being that the court did not give the accused the latitude he was entitled to in the cross-examination of the jurors when examined on their *voir dire*; the second being that after the jury had been so examined the court overruled defendant's motion to have his witnesses heard in support of the averments of his motion for a change of venue and for the purpose of rebutting any inference that could be drawn from the examination of the jurors, that he could obtain a fair and impartial trial in the parish of St. Landry.

The precise course followed in the lower court does not appear in the record. We judge, however, that the thirty jurors of the regular panel selected for the third week of the session were called and each separately examined upon his *voir dire*—questions being first propounded by the State and then by the defence—that those whose answers were of a character to show them incompetent were set aside, while those who were deemed by the court proper jurors were held in reserve to be ultimately tendered to both parties. That when so tendered on the actual formation of the jury, defendant peremptorily challenged individual jurors as they were presented; that under this proceeding the regular panel was exhausted (only six

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jurors having been taken therefrom); that thereupon the court then ordered the sheriff to bring in talesmen, who were in turn examined and accepted or rejected until twelve jurors were found; that in the formation of the jury in this manner the defendant exhausted his peremptory challenges. We do not find that bills of exception were taken to the action of the court in respect to the individual jurors accepted, but there is a bill covering the general line of proceeding and touching the restriction placed upon the cross-examination of the jurors by the defence. The court accepted the course adopted as having [by the fact itself that twelve jurors were found who in its estimation were proper jurors] conclusively established that the defendant could obtain a fair and impartial trial in the parish of St. Landry, and limited the scope of the inquiry on that subject to the questions propounded and answers made thereto by the jurors and talesmen. He excluded all testimony outside of this. The application for a change of venue was based upon allegations sworn to that he could not obtain a fair and impartial trial in St. Landry because of the intense and wide-spread prejudice against him in the public mind; that this prejudice was political and partisan, and permeated every branch of the court; that during the last political campaign the parish was divided into two fiercely hostile parties marching and countermarching through the parish—that there were several collisions between them resulting in serious injury to persons and property—in some cases in death. That the contest resulted in the election of the then presiding judge of the court and the then prosecuting attorney. That the district clerk and the sheriff both belonged to the same side as the judge and District Attorney; that political feeling and prejudice and bias were heavy in the atmosphere in and about the court house. That the court (however unconsciously) was influenced by that feeling was shown by the fact that it had appointed none but partisans upon the jury commission. That the clerk and jury commission were partisans, and that they carried their partisan feelings into the performance of their duty, was attested by the fact that they selected for the then term of court, under the jury law of 1894, a grand jury panel composed exclusively of partisans, and that on the *venire* of the petit jury drawn for six weeks of the term there were not over half a dozen names that were not partisans belonging to the side of the clerk and jury commissioners. That defendant was an active and avowed partisan on

the side opposite to that of the presiding judge and District Attorney and the deceased was a still more active and avowed partisan of the other side—that the encounter which resulted in the homicide with which defendant was charged grew out of the election and was a direct consequence thereof—that it happened in the town of Opelousas on the day following the election and defendant narrowly escaped being mobbed at the time—that the partisan feeling referred to was directed against himself individually as well as against the party he belonged to generally; that partisan feeling was so strong and deep-seated in St. Landry that the man in the parish who was not affected by it was an exception; that under the circumstances it was utterly impossible for one accused of a crime which grew out of the last political campaign or which was closely connected with it to obtain there at that time, and perhaps for years to come, a fair and impartial trial.

The District Attorney complains of this application as being insulting to the presiding judge. There are certainly portions of it which are exceedingly objectionable; not only in respect to the judge, but as to other matters. We have purposely abstained from transcribing them. We do not think that the mere fact itself that a suitor should allege in a prosecution pending against him that the judge of the court has acted in a manner such as to have illegally prejudiced his rights furnishes ground for legal complaint, when the assertion of such a claim would be essential to his protection. The law has pointed out no method of attacking or annulling by direct action a verdict in a criminal case and a judgment based thereon for wrongful action on the part of the presiding judge in the performance of his duties. A defendant would certainly be entitled to protection at some time and in some shape or form; from the necessity of the case he would have to set up his complaints in the pending suit, and he should be allowed to introduce his testimony in support of the same. We would not expect the presiding judge to express any opinion adverse to himself in the premises, but the whole matter would fairly come before the appellate court in reaching its conclusions as to whether actual wrong or injury had been done.

As a matter of course such a complaint should contain no abusive, opprobrious or intemperate expressions. See Wharton, Sec. 49.

An examination of the motion will show that several of the matters therein charged were matters more for a challenge to

the general panel or array than for an application for a change of *venue*. They were not advanced for the former purpose. We are authorized, however, we think, to consider them incidentally in dealing with the question of the change of *venue*. Accused maintains that in view of the method of the selection of the jury commissioners, the manner of collecting the jury and of obtaining talesmen, he was illegally hampered in his effort to show that a fair and impartial trial could not be had in the parish by limiting the witnesses testifying on that subject to witnesses not of his own choosing.

Section 1023 declares that an application for a change of *venue* "may be made orally in open court or by petition in chambers, and shall be accompanied with proof under oath of the party or his attorney that reasonable notice has been given to the District Attorney of such application. Thereupon the judge shall hear the party making the application, as well as the attorney representing the State, and, if on such hearing and examination of the evidence adduced he shall be of opinion that the party applying can not have a fair and impartial trial in the parish where the indictment is pending, the judge shall award a change of *venue* to the adjoining parish of the same judicial district, or of an adjoining district, and if possible to that in which a District Court shall next be held."

From an examination of the proceedings taken below, those on the motion for a change of *venue* seem to have been substantially merged into an examination of jurors and the empaneling of a jury. As a substantive motion and proceeding, it seems to have been lost sight of and disappeared. Accused was not permitted to offer witnesses, but was confined to the cross-examination of the jurymen and talesmen who were produced before the court. We do not think that the answers of the jurors and talesmen should have concluded the accused. He was entitled to traverse, contradict and disprove their statements if he could. As the condition of a juror's mind, in respect to his being unbiased and impartial, rests entirely upon his own assertion, his declaration on that subject surely should not close the door to an investigation and examination of facts which would tend to show that the juror either unconsciously or designedly was not stating the truth. Before reaching his conclusions upon the motion for a change of *venue* we are of the opinion the court should have heard the witnesses whom the accused sought to have testify. As the extent of the line of cross-examination of the jurors which

the defendant was permitted to make was made a subject of complaint in this same bill of exception, we take occasion to say that in our opinion the court narrowed the examination too closely. It was particularly desirable under the averments of the motion to change the *venue*, that the jurors should be subjected to a very rigid test. As the testimony which defendant sought to introduce was excluded we are unable to say whether he was entitled to a change of *venue* or not. All that we can do, as matters stand, is to set aside the court's action on that subject and reserve to defendant, as we do hereby reserve to him, the right to renew his motion for a change.

Complaint is made in the fourth bill that the court "refused on the day the case was fixed for trial to allow additional compulsory process or *alias* subpoena to issue to a witness named Charles Medici, to have return made upon said process and to grant time until this should be done, defendant objecting to go to trial." Defendant in the bill states that he had on the 14th September (when the case was fixed for trial for the 17th) applied for and obtained compulsory process for the witness, who was living at the time in the parish of Ascension; that the *subpœna* had been received by the sheriff of the latter parish on the 16th, but he made no effort to serve the same, as would appear by a letter from him of that date to the clerk of the St. Landry court. Directly connected with this complaint is that urged in the fifth bill, that the court refused to grant defendant a continuance to obtain the testimony of the witness Medici, as asked for on the grounds urged in his affidavit and motion therefor. Both applications were denied on the ground that the State stood ready to admit and did admit that the witness if present would testify as stated in the affidavit for the process, and that under such an admission defendant was legally called upon under the provisions of Act 84 of 1894 to go to trial. We find in the record the letter of the sheriff of the parish of Ascension referred to. In it he says that "he returned to the clerk the notices sent for service; that in the first place the person named was unknown to him, and in the second place, even if he could make service, the person would find it impossible to be in Opelousas by 10 o'clock A. M. on the 17th—that he (the sheriff) had received the notice only on the 16th of September." There seems to have been no attempt to secure the service—and no return was made upon the subpoena by the sheriff. It is stated in one of the bills that the

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original application for a subpoena was annexed to it, but we do not find it attached as declared. It is useless for us to decide whether the action of the court, taken on that occasion, was or was not correct, as the case is remanded on other grounds, and it is not likely that this particular question will arise again under precisely similar circumstances. We notice that in the application for a continuance Medici is referred to as "formerly" of the parish of Ascension, and that there is no declaration or statement where he then was. Whether as a fact Medici ever lived in the parish of Ascension is uncertain—the fact is alleged, but it is nowhere sworn to. It was the duty of the defendant to have shown affirmatively the residence of Medici, or that there was good reason to believe that the witness could be reached by subpoena at the place to which it was directed. It would have been of no practical use to have issued a second subpoena to a person in Ascension parish who had "formerly" been a resident there. However irregular the action of the sheriff of the parish of Ascension was, defendant evidently adopted his conclusion that the witness was no longer to be reached there. We are of the opinion that when this case was fixed for trial the defendant should at once have called the special attention of the court to the fact he would require on his behalf the presence at the trial of a material witness who was in another parish and insist that in fixing the day of trial sufficient time be given to the sheriff for a proper search for the witness, for due return on the process issued and for the witness to comply with the orders of court. On proper showing made we do not presume the court would have pressed the case to trial.

We think a defendant when he has counsel should, as soon at least as he is indicted, take steps to ascertain where the various witnesses whom he will need live, or where they can be reached, and that he can not properly rely for the purposes of a continuance upon the discovery of that fact through mere experimental process to be sent to sheriffs of parishes in which it is possible the witnesses may be found. Such a practice would lead to great abuse.

A question has been raised as to whether a person charged with crime, who would (but for the provisions of Act No. 84 of 1894) be entitled to a continuance of his case in order to procure the attendance on his behalf of an absent witness, can, in view of Art. 8 of the Constitution, be legally and constitutionally forced to trial (under

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authority of the act mentioned) by an admission on the part of the District Attorney that the witness, if present, would testify to the facts stated by the accused in his motion for process or for a continuance. Article 8 of the Constitution declares that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.

In Act No. 84 of 1894 it is enacted that "in all criminal cases whenever either the State or the defendant asks for a continuance on the ground of the absence of an important witness, the other shall be entitled to an immediate trial on admitting that if said absent witness were present that he would testify as stated in the affidavit made for a continuance, but in no case shall the defendant be required, in order to get a trial, to admit that the statements made in the affidavit for a continuance."

The right of an accused person to insist upon the presence in court of the witnesses material to his defence has been frequently the subject of discussion and adjudication. Many authorities will be found collected in Rice's Work on Evidence, Vol. 3, Chap. 19. "Of the evidence necessary to secure a continuance" (Sec. 114). "Right not affected by admissions of opposite party," also in the same author, Chap. 30, pages 269 and 270.

We are unwilling to pass upon the constitutionality of a statute unless imperatively required to do so. No such necessity exists in the present case. We content ourselves with saying for the present that the law is at least in derogation of common right, and that recourse to it should be avoided if possible.

The twelfth bill comes to us under contradictory statements, made by the court and counsel. Not having the evidence taken in the case before us, we accept as correct the court's declaration that when the testimony objected to was offered the State announced that it was offered in rebuttal of the defendant's evidence, and that when introduced it was actually in rebuttal. We have stated heretofore (State vs. Spencer, 45 An. 1) that, in our opinion, justice to an accused party requires that the State should at once offer on its side all the evidence which it has and not reserve its real or main attack until after defendant had closed his case. That there were, however, so many reasons why, under special circumstances, this course should be departed from, and so many occasions on which such departure

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from it would be proper, that it could not be invoked as a matter of legal right. That this matter would have to be left in each case to the sound judicial discretion of the court, which, having knowledge of the general rule, would protect the defendant by enforcing it, unless by reason of some exceptional state of facts.

In Rice on Evidence, Vol. 3, Sec. 218, it is said: "The rule is well settled that in rebuttal the people are restricted to evidence controverting the facts proven by the evidence of the defence and that no evidence confirmatory of the original case can be introduced by way of rebuttal, even though it clearly establishes the prisoner's guilt." (McLeod's Trial Pamphlet, p. 222; Rex vs. Hilditch, 5 Car. & P. 299; Rex vs. Stimpson, 2 Car. & P. 415; Brown vs. Giles, 1 Car. & P. 118; 2 Philips Evidence, Note 500.) * * * "No rule for the conduct of a trial is more familiar than that the party holding the affirmative is bound to introduce all the evidence on his side before he closes." (Hastings vs. Palmer, 20 Wend. 225.) "He must exhaust all his testimony before the testimony on the opposite side can be heard." (Ford vs. Niles, 1 Hill, 301; Rex vs. Stimpson.) "He can afterward introduce in rebuttal only—rebutting evidence in such cases means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove." (Silverman vs. Foreman, 3 E. D. Smith, 322; Rex vs. Stimpson, *supra*.) "These rules may in special cases be departed from in the discretion of the trial judge; but a refusal to depart from them is no ground of exception." (Marshal vs. Davies, 78 N. Y., 414.) * * * Rice, after having quoted the opinion of Lumpkin, Judge, in Walker vs. Walker, 14 Ga. 242, 250, wherein he expressed himself in favor of the reception at any time of additional cumulative and corroborative evidence of facts previously proved or which tends to strengthen and add force or probability to such evidence—pushes this matter to its extreme length, saying: "So largely is the admission or exclusion of evidence not strictly in rebuttal a discretionary matter with the court that we are justified in formulating a general rule that material testimony in a case should be admitted at any time before the formal submission of the case to the jury. The presiding judge in the exercise of this discretion has absolute immunity from all review unless it should clearly appear that there was a wilful abuse

of the discretion confided to him. Of course where important testimony is withheld with the obvious purpose of placing either party to a disadvantage the trial court would be abundantly justified in refusing its admission." (Gaines vs. Commonwealth, 50 Pa. 319; Dozier vs. Jerman, 30 Me. 216, 220; Huntsman vs. Nicholls, 116 Mass. 521; Morse vs. Potter, 4 Gray, 292; Marshal vs. Davies, 58 How. Pa. 231.)

Fourteenth Bill. The court in its reasons for refusing to grant defendant's request [made while the jury was being examined generally on their *voir dire*], "that tales jurors be not summoned within the town of Opelousas," stated that it knew of no law which would warrant such a request. That Sec. 7 of Act No. 99 of 1896 directed the manner in which talesmen should be summoned and the court had complied with its requirements in its order on the subject to the sheriff. The order referred to was that "the sheriff of St. Landry will go out into the town of Opelousas and summon twenty-five or thirty talesmen jurors, securing if possible persons living in the country and remote from the town. He will go through the town and near the railroad at the cotton yards and endeavor as above stated to secure the attendance, if possible, of jurors living outside the corporate limits. Upon his failure to secure these he will summon jurors in the town from outside this court room."

The seventh section of Act No. 99 of 1896 declares that whenever the District Judge thinks proper he shall require the jury commission to select additional jurors for service either as regular jurors for service, or as talesmen, pursuant to formalities prescribed in Sec. 5 of this Act, and they shall be summoned without delay or within the time the said judge requires; but nothing shall be construed so as to limit the right of the judge in criminal matters to order the summoning of talesmen from among the bystanders or from any portion of the parish remote from the scene of the crime which the judge may designate.

This bill is not pressed very strongly, possibly because of appellant's reliance upon his bill of exception covering the refusal of the judge to hear testimony upon the motion to change the venue. The lawmaker evidently presumed that there would exist a greater state of excitement at or near the place of homicide than there would at a distance, and therefore intimated that, as a rule, it would be well that talesmen should be drawn from places remote from the scene

Pringle vs. Construction Co.

of a homicide. We do not look upon the provisions of the seventh section as mandatory upon that subject, without regard to the facts of any special case. A certain discretion has to be left to the court, to be exercised by it in such manner as that wrong and disadvantage be worked to neither State nor to the accused. The bill is not pressed in a way to call for special action upon it.

We do not pass upon a number of bills of exception which we find in the record, for the reason that some of the matters complained of are not likely to occur on the next trial, and others are presented to us under conditions such as to make it difficult for us to properly deal with them.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the verdict of the jury and the judgment of the District Court based thereon, which is herein appealed from, be and they are hereby set aside, annulled, avoided and reversed; and the cause is hereby remanded to the District Court for further proceedings according to law.

No. 12,356.

R. W. PRINGLE VS. ELTRINGHAM CONSTRUCTION COMPANY.

A corporation organized for the exclusive pecuniary benefit of its members may be wound up by a majority of its members in their discretion whenever they deem this step to be in the interest of the whole association; provided, this is done in good faith, and not for the purpose of speculation and the intention of starting the company's business anew at a subsequent time.

The articles of association form a contract between the members, and when it provides for the manner of winding up the business, and no reason is shown why the mode and manner provided can not be executed, a receiver can not be appointed to the corporation on the demand of one of the members of the corporation, who is dissatisfied with the action of the majority.

49 301
50 794

APPEAL from the Eighth Judicial District Court for the Parish of Concordia. *Dagg, J.*

Lazarus, Moore & Luce and Elam & Dale for Plaintiff in Rule for Appointment of Receiver, Appellant.

Boatner & Hough for Defendants in Rule, Appellees.

Pringle vs. Construction Co.

Argued and submitted January 20, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

MCENERY, J. The defendant corporation was organized for the purpose of doing levee, railroad and similar work.

The corporation is composed of three persons who own the entire stock. The plaintiff is a member of the corporation and so are the other two litigants. The plaintiff instituted suit against the other two members of the corporation for a partition in kind of the effects of the corporation. The company was made a party and cited. Alexander Eltringham made defendant as president of said company and individually and as a stockholder, answered alleging that the corporation was no longer "a running, going, operating corporation; that under an agreement entered into between the stockholders said company could take no more contracts; that the mules, work stock, etc., were maintained at a considerable loss, and that the continued maintenance of the work stock, paying wages, etc., would with the pending litigation consume all assets of the company, unless liquidators were appointed and the property sold and distributed among the shareholders; prayed that the other two shareholders be cited to show cause why liquidators should not be appointed, the property sold and the proceeds deposited in some bank selected by the court to await the final judgment of the court. An exception was filed to the rule. An amended petition was filed praying for the appointment of a receiver. The voluminous pleadings finally terminated in the issue being presented to the court whether a receiver should be appointed. The court declined a receiver, and the mover in the rule appealed from this decree. The evidence discloses that the corporation is solvent; that the shareholders had agreed to stop work, and thus practically dissolve the corporation. The testimony does not show that the property of the corporation has been abandoned, or that there are no persons to take charge of the assets of the corporation. Conceding that the corporation has been dissolved, the charter provides for the liquidation of its affairs in such a contingency.

In pursuance of this provision of the charter the three principal stockholders, after notice, met, and a resolution was passed provid-

State ex rel. Minor et als. vs Judges.

ing for the appointment of commissioners to liquidate the affairs of the corporation. Clark and Pringle voted for the resolution; Eltringham protested. It is not shown that the commissioners are unable to liquidate the affairs of the corporation.

It is a fundamental principle that a corporation organized for the exclusive benefit of the corporators, or shareholders, the majority of its members may, in their discretion, wind up its business whenever they deem this step to be in the interests of the whole association.

The majority may, without the consent of the minority, sell the whole of the company's property, close up its business and distribute its assets, provided this is done in good faith, and not for the purpose of speculation and the intention of starting the company's business anew at a subsequent time. Morawetz on Private Corporations, par. 413.

All the shareholders in the defendant corporation had agreed to wind up its affairs. The contention is as to the mode. The charter provides the means of winding up the corporation. It is law to the shareholders. The articles of association are contracts between them, and must be followed. No reason is shown why this corporation can not be wound up as agreed in the articles of association.

Judgment affirmed.

MILLER, J., concurs in the decree.

No. 12,423.

STATE EX REL. WIDOW CHARLES MINOR ET ALS. VS. JUDGES OF THE COURT OF APPEALS.

49 303
52 1042

49 303
125 684

In a suit to annul a tax sale, the amount which the plaintiff has to pay, under Art. 210 of the Constitution, before obtaining the nullity of the sale, and the possession of the property, is a part of the judgment, and a necessary sequence of it, and not a reconventional demand. The judgment is an entirety, and the plaintiff having obtained a judgment annulling the sale, and to be placed in possession of the property, if he feels aggrieved at that part of the judgment relating to the amount to be refunded to defendant, he has a right to appeal from the whole judgment. If the value of the property in contest is sufficient to give jurisdiction, he has the right to go to that court having jurisdiction of the amount.

ON APPLICATION for Writs of *Certiorari* and *Mandamus*.

Theo. Cottonio for Relators.

State ex rel. Minor et als. vs. Judges.

Respondents in proper person.

Submitted on briefs February 6, 1897.

Opinion handed down February 15, 1897.

ON APPLICATION FOR WRITS OF CERTIORARI AND MANDAMUS.

The opinion of the court was delivered by

MCENERY, J. The relator sued for an undivided interest valued at three hundred dollars in certain property. The tax sale was attacked, and the defendant prayed in case judgment was rendered against him to be reimbursed the amount of the price of the adjudication of said property, and the amount of taxes which he had paid on same since the adjudication to him. The price of adjudication and taxes amounted to ninety-three 90-100 dollars. There was judgment for the plaintiff, annulling the tax sale, and for the defendant's retention of the property until the above amount should be paid. The plaintiffs believing they were not bound for so much, but only for one-half of said amount, appealed to the respondent court. The appeal was dismissed, because it was from a reconventional demand, less than the lower limits of the jurisdiction of said respondent court. The relator now seeks the supervisory jurisdiction of this court to have said order of dismissal set aside, and the case reinstated on the docket.

There was error in treating the demand of defendant for reimbursement, and to remain in possession of the property until the amount should be paid as an independent and reconventional demand. No personal judgment could have been rendered against the plaintiffs for said amount. It was accessory to the suit and necessarily accompanied the judgment to be rendered in the case.

Article 210 of the Constitution says: "No sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with ten per cent. interest, be tendered to the purchaser." We have held that this amount need not be tendered before the filing of the suit, but may await the judgment. No tax sale can be annulled until the amount ascertained to be due is paid. The decree ought to and usually does recite that the defendant retain possession until the amount is paid, whereupon the judgment

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annulling the tax sale becomes absolute. As stated this decree ordering the retaining of possession by the defendant is only a necessary sequence of the judgment, and not an independent demand.

The judgment was an entirety and incorporated as a part of it the decree for reimbursement and retention. It could not have omitted this. The appeal, therefore, as to the amount in dispute is the value of the property, for the possession of which suit was instituted, with the added reimbursement claimed by defendant.

The rule herein granted is made absolute and the relief prayed for granted.

No. 12,187.

JULIUS FREYHAN VS. W. H. BERRY ET ALS.

Where one who has contracted for the erection of buildings and who claims that the instalment or instalments due the contractor are withheld, because of privilege claims against the contractor and the fund, brings suit against the contractor and those claiming amounts due with lien upon the building, but declaring that he deposits the instalments so withheld in court, but fails to make said deposit, he does not bring about a *concursus*, there being no fund with the court for distribution.

When by final judgment the court orders the plaintiff to make the deposit which he had failed to make as alleged by him, and renders judgment against him in favor of the different defendants brought into court, the plaintiff appeals suspensively from such judgment, the Supreme Court (to determine its jurisdiction) will deal with the different judgments as if adjudged in separate and distinct actions, and will take cognizance of only such judgments as exceed two thousand dollars.

When the difference between an amount claimed against plaintiff by one of the defendants and the *pro rata* adjudged to him out of the admitted indebtedness of the plaintiff is less than two thousand dollars, the appeal will be dismissed

APPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Saunders, Miller, Smith & Hirsch for Plaintiff, Appellant.

Harry H. Hall for Daniel Pike, Defendant, Appellee.

John Dymond, Jr., and H. P. Dart for Defendants, Appellees.

49	306
49	1610
49	805
51	797
49	805
123	732

Freyhan vs. Berry et al.

Benjamin Rice Forman for Sidney Patridge, Syndic of the insolvent Michael Ross, Defendant, Appellee.

Argued and submitted December 16, 1896.

Opinion handed down January 4, 1897.

STATEMENT OF CASE.

Plaintiff alleged that he had entered into a contract with the defendant Berry to build several buildings for him for the sum of eighteen thousand two hundred and forty dollars, to be paid in seven instalments, payable as the work progressed; that the final instalment of twenty-six hundred and forty dollars was payable fifteen days after the completion of the buildings, and provided no liens should then have been recorded against the buildings; that Berry had erected the buildings; that petitioner had paid the first six instalments; that after said payments sundry persons had presented to him claims which they declared they held against Berry for labor performed and materials furnished in the construction of the buildings; that after the buildings had been completed and delivered to petitioner he obtained from the mortgage office of the parish of Orleans a certificate, from which it appeared that certain named persons and companies had asserted and recorded claims against the buildings as secured by privilege thereon, amounting in the aggregate to five thousand and forty-seven dollars; that he did not know whether Berry, the builder, who alone contracted all the debts, admitted the same as correct; that as the first six payments had been paid to Berry, according to the terms of the contract, before any of the said claims had been presented to him or recorded, petitioner was not liable to said parties for any sum beyond the unpaid seventh instalment of twenty-six hundred and forty dollars, and none of them could assert a privilege on the buildings after he should have paid out to whomsoever was entitled thereto the said sum of twenty-six hundred and forty dollars; that the claimants could not agree on the distribution of said sum among themselves, and threatened suit; that some of them had already sued the plaintiff; that the respective rights of the parties could only be determined by calling them all into a *concursus*, and having them examined

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into and adjudicated upon contradictorily with each other, with Berry and with petitioner. He deposited into court the said sum of twenty-six hundred and forty dollars for the benefit of said Berry and said claimants.

In view of the premises, he prayed that, after due proceedings, there be judgment fixing the mode and rate of distribution among said claimants of said sum of twenty-six hundred and forty dollars and judgment contradictorily with said claimants; decreeing that petitioner was not liable for anything in excess of said twenty-six hundred and forty dollars, and that all the privileges and liens mentioned on the said certificate of mortgage be canceled and erased on said claimants receiving such pro rata of said twenty-six hundred and forty dollars, as they should be decreed to be entitled to receive in the judgment to be rendered in the premises.

At the time this proceeding was instituted, petitions had been filed in the Civil District Court by four of the parties named in the certificates of mortgages against Julius Freyhan and W. H. Berry, asking judgment against them *in solido*. The first of these suits (docketed under the number 44,580) was instituted on the 11th December, 1894, by the Central Manufacturing Company, asking judgment for thirty-one hundred and fifty-three dollars, with lien and privilege upon the buildings for materials and merchandise sold and delivered to Berry, to be used by him in the erection of the buildings. Plaintiff in that case averred that the buildings had been completed and delivered, and the price had been paid by Freyhan; that in due time and before said payment, and while there was money in the hands of Freyhan due to Berry, it had attested its account, recorded the same, and served the same on Freyhan; that the buildings were erected under written contract between Freyhan and Berry, which had been recorded in the mortgage office of the parish of Orleans. Plaintiff charged that Freyhan was solidarily indebted to it, because he overpaid Berry and paid him money in advance and in violation of the contract, and before the same became due, without the knowledge of petitioner, amounting to more than five thousand dollars, to his great loss and injury, and because it was his duty under the law governing such cases to see that no money was paid to the builder until claims like petitioner's had been paid and secured.

On February 4, 1895, this suit was transferred from Division "E"

Freyhan vs. Berry et als.

to Division "C" of the Civil District Court, and cumulated with the suit brought by Freyhan against Berry and the other lien claimants.

The second suit was filed on December 13, 1894; John O. Beneke, subrogee, seeking judgment against Berry and Freyhan *in solido* for one hundred and sixty dollars, with recognition of privilege on Freyhan's buildings.

The third suit (No. 44,554) was filed December 13, 1894, by E. A. Mattes against Freyhan and Berry, asking judgment against them *in solido* for five hundred and forty-one dollars, with recognition of privilege on the buildings erected by Berry.

The fourth suit (No. 44,363) was that of Daniel Pike against Berry and Freyhan, asking judgment *in solido* for three hundred and seven dollars.

The allegations of these last three suits were substantially those of the Central Manufacturing Company. The four suits were, by orders of court, cumulated with the present one.

The court rendered judgment in the present proceeding in favor of the Central Manufacturing and Lumber Company, and against Freyhan and Berry for three thousand one hundred and fifty-three dollars and interest, and recognizing the privilege claimed by them.

In favor of Daniel Pike against the same parties for three hundred and seven dollars, with interest and recognition of privilege.

In favor of Beneke against the same parties for one hundred and sixty dollars, with recognition of privilege.

In favor of Mattes against the same parties for five hundred and forty-one dollars, with interest and recognition of privilege.

Also in favor of Platesmeier, J. J. Clarke, John Bass, syndic, in sums aggregating seven hundred and forty-five dollars.

The demand of Freyhan for the cancellation of the privileges existing in favor of these different parties was rejected and his suit dismissed.

The court decreed with respect to the sum of twenty-six hundred and forty-one dollars (admitted by Freyhan to be in his hands subject to his order) that there be judgment against Freyhan in favor of the different parties to the suit (with the exception of Berry), and that said sum be deposited in court for distribution among said parties by appropriate proceedings, with reservation of their privilege on the buildings.

Freyhan (the plaintiff) alone has appealed from the judgment.

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He has appealed suspensively. Michael Ross having gone into insolvency, his syndic made himself a party in this court and moved to dismiss the appeal; first, because the amount in dispute on his demand in reconvention, and for which he had judgment in the District Court, is only two hundred and fourteen dollars and below the jurisdiction of the Supreme Court; second, because there is no fund for distribution, none having been deposited in the lower court; third, because the plaintiff Freyhan had acquiesced in the judgment since the appeal was taken, he having paid a part of the judgment appealed from, particularly the judgment in favor of the Central Manufacturing Company, Beneke, John J. Clarke and Mattes.

The opinion of the court was delivered by

NICHOLLS, C. J. The allegations made in the last ground for dismissal are given color to from the non-appearance in any way in this court of counsel who are certainly not chargeable with ever leaving unguarded the actual interests of their clients. We have not been informed what appellant complains of, nor as against whom his complaints are directed. We would be inclined to affirm the judgment itself under such conditions, as judgments of the lower court are presumptively correct and we could not be expected to seek to discover and prove them otherwise. We have, however, reached the conclusion that the appeal should be dismissed. Appellant failed to deposit any fund in court, and suspensively appealed from the decree that it should be so deposited. We do not think the appeal can be sustained upon the theory that a *concursus* was brought about through the plaintiff's suit. Whatever effect, as between the different parties claiming judgments against Freyhan and Berry, may have flowed from the fact that the different judgments rendered by the District Court in their respective favor, were rendered in one and the same proceeding, it can not be said it brought presently before the court any fund for distribution. (See *Denegre vs. Mushat*, 46 An. 90; *Wheelwright vs. Transportation Co.*, 47 An. 540.) We have, for present purposes, to deal with the different judgments as if they had been adjudged in separate, distinct actions. This result carries with it as a consequence that none of the judgments below in which the matter in dispute was less than two thousand dollars have been brought up for review through this appeal. The only claim for over

State vs. Perkins.

two thousand dollars which was involved in the lower court was that of the Central Manufacturing and Lumber Company, Limited. Was the situation of that claim in the District Court such as to authorize this appeal from the judgment rendered in respect to it? Freyhan, in his pleadings, acknowledged a liability of twenty-six hundred and forty dollars, either to Berry or to the laborers and material men who were brought into the suit. He stood indifferent as to the distribution of the fund between these different parties. When the court rendered judgment in this suit, the pro rata out of the amount admitted by Freyhan to be due, falling to the Lumber Company, under the decree was such that that amount being deducted from the total claim of the company left as the only amount in dispute between it and Freyhan and Berry a sum less than two thousand dollars. A controversy touching a liability of Freyhan for a larger amount to the Lumber Company would not sustain this appeal. The appeal would fall independently of any question of acquiescence or a payment by Freyhan of the judgment rendered touching it.

We think the appeal should be dismissed, and it is hereby dismissed.

No. 12,850.

STATE OF LOUISIANA VS. F. M. PERKINS.

An objection of insufficiency of the description of the article stolen in an indictment urged for the first time in arrest of judgment will not prevail.

Under Sec. 1047, Revised Statutes, upon objection properly made the description of the thing charged to have been stolen could, by the court, have been made to conform to the defendant's requirements.

A PPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Hunter, J.*

M. J. Cunningham, Attorney General, and *Phanor Breazeale*, District Attorney, for Plaintiff, Appellee.

Robert P. Hunter for Defendant, Appellant.

Submitted on briefs January 9, 1897.

Opinion handed down January 18, 1897.

State vs. Perkins.

The opinion of the court was delivered by

NICHOLLS, C. J. The defendant was convicted and sentenced under an indictment for larceny, in which the property stolen was described as "one beef of the cow kind."

He filed no demurrer nor motion to quash before trial, but reserved his present objection to the indictment to be advanced on a motion in arrest of judgment. Defendant cites a number of authorities to show that a description of so general a character of the thing stolen as that given in the indictment we are considering is insufficient. He particularly relies upon *State vs. Hoyer*, 40 An. 744, and *State vs. Johnson*, 29 An. 714, though he refers to *State vs. Edson*, 10 An. 229; *State vs. Muston*, 21 An. 442; *State vs. Monroe*, 30 An. 1242; *Banks vs. The State*, 28 Texas, 644; *Stollenwerk vs. State*, 55 Ala. 142; *Wharton's Criminal Practice and Pleadings*, Sec. 209, and *Wharton's Criminal Evidence*, Sec. 124.

In *State vs. Johnson*, cited, the charge was of larceny of "an animal of the cow kind." The insufficiency of the description was set up in a motion in arrest of judgment. The complaint was that the indictment was bad for not specifying the particular animal of the cow kind charged to have been stolen. Of this the court said: "It is certainly very loose pleading to charge simply the larceny of 'an animal of the cow kind,' and it is too uncertain to be encouraged. This was, however, one of those things which, under Sec. 1047 of the Revised Statutes, the court might have permitted to be amended, it being in the language of the statute 'the name or description of a thing named or described in the information.' While, however, we are not disposed to encourage so loose pleadings, we are not prepared to arrest the judgment for a matter which might have been, and (as the case then stood) may yet under leave of court be amended."

In *State vs. Thomas*, 30 An. 601, where the property stolen was alleged to be "one small hog of the value of five dollars, the property of James Galagher," this court, referring to the motion in arrest of judgment urged by defendant, said: "If—as it is—that description was incomplete, its incompleteness would constitute a formal defect, apparent on the face of the indictment, and defendant's objection should have been taken and urged—not as it was—on motion to arrest the judgment, but by demurrer and a motion to quash the indictment before the jury was sworn. It is too late to do

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so after trial and conviction. (Citing in support of its opinion Revised Statutes, Sec. 1064.)

There is a growing tendency in criminal proceedings to cut off objections based upon matters which are the subject of amendment or correction, prior to trial, which are postponed to be urged for the first time after conviction. There is, to some extent, an aid by trial and verdict in criminal as well as civil cases. There was no attempt made by defendant here to have the indictment against him made more specific than it was. Had there been a call for specifications, or an objection made to the generality of the description, we assume that matters could and would have been made to conform to defendant's requirements.

The Attorney General calls our attention in support of the indictment itself to *State vs. Carter*, 33 An. 1214, where defendant was indicted for stealing "one hog;" to *State vs. King*, 31 An. 179; 2 An. 295; 2 Bishop Crim. Law, Sec. 769; 2 Archibold (Pomeroy's note), p. 1160, and particularly to *State vs. Baden*, 42 An. 295, in which defendant was charged with the larceny of "one beef of the value of fifteen dollars, the property of A. T. Broussard," and in which *State vs. Hoyer* is mentioned. The objection in *State vs. Baden* was urged through a motion to quash. The motion was overruled, and on appeal the action of the District Court was affirmed. In the present case we are not called on to go further than to say that as against an objection of insufficiency of description urged for the first time in arrest of judgment the indictment must stand. The word "beef" conveys to the mind when used as clear an idea of a definite object as does pistol, hat, spade, or any other well-known word in common use. The addition to it of the words "of the cow kind" does not weaken its meaning.

The judgment appealed from is hereby affirmed.

 No. 12,389.

PHILIAS GATHE VS. M. L. BROUSSARD AND ROBERT MARTIN AND
SEBASTIAN HIRIART AND JAMES L. BARKER.

1. When counsel fees are claimed and when testimony has been taken upon that subject, it is the duty of the court to bring to bear its knowledge of the value of the services of counsel from an examination of the record in which they were rendered; but it should not, when no evidence at all has been

49	312
49	764
49	1648
49	312
108	169
49	312
115	916
49	312
119	237

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- taken, attempt to fix such value, even by consent and request of litigants. State *ex rel.* Abraham vs. Judges, 43 An. 889.
2. On appeal, the appellees neither appealing nor asking any change in the judgment appealed from, can obtain no change or reversal of the judgment of the lower court. Talle vs. Monasterio, 48 An. 1232.
 3. Where a person in possession of property under a title by purchase is made defendant in a petitory action, and judgment is rendered in favor of plaintiff, decreeing him the ownership of the same, the fact that defendant's vendor was not made by him a party to the suit, may leave the question of title open incidentally to inquiry in determining the personal responsibility of the latter in warranty (C. C. 2517-2518), but it is closed by the judgment as between the vendors and the plaintiff in the petitory action. It can not be re-opened by bringing the latter into the suit between the vendee and his vendor, touching the responsibility of the latter on his warranty.
 4. When a question is before a court only incidentally in connection with the determination of a main issue before it, and the issue with which it was connected has been finally disposed of, the incidental question disappears from the case as a matter for adjudication.

A PPEAL from the Nineteenth Judicial District Court for the Parish of St. Martin. *Voorhies, J.*

James E. Mouton for Martin & Broussard, Defendants, Appellees.

Hébert & Hébert for Barker & Hiriart, Defendants, Appellants.

Argued and submitted January 6, 1897.

Opinion handed down January 18, 1897.

Plaintiff alleged that on April 17, 1893, he purchased from the defendants, Broussard and Martin, certain property described in his petition (declared in the act of sale to be in the parish of St. Martin) for the price of four hundred dollars, of which two hundred dollars were paid in cash, and the balance was represented by the purchaser's note secured by mortgage and vendor's privilege, due February 16, 1894, with eight per cent. interest per annum from maturity; that petitioner immediately took possession of the property, and made thereon, for the purposes of working the same, expenses and investments to the amount of seven hundred and ten dollars, consisting mainly in employing labor for the under-cutting, the deadening and felling of cypress trees, the trailing and

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drafting thereof for market; the purchase of goods and necessary supplies and provisions for the laborers by him employed; that while in the possession of said land as owner he caused to be cut thereon and floated and made ready for market some two hundred and six trees, worth at least the sum of seven hundred and fifty dollars, when on or about the 1st September, 1893, the same were sequestered at the suit of Sebastian Hiriart and James L. Barker, claiming them as having been cut from lands belonging to them, averred to be situated in the parish of Iberville, being the identical lands purchased by petitioner from Martin and Broussard; that in said suit the said trees were decreed to belong to said Hiriart and Barker. Petitioner averred that his vendors, Broussard and Martin, were bound to him in warranty as to the validity and legality of the title to the land so sold by them to him; that if they were not at the time the owners of the property they could not validly sell or transfer them to him, and that said sale to him was null and void, or, at least, should be annulled, avoided and canceled, and he should not only be released from all liability arising from his purchase, but reimbursed that portion of the price which he had paid cash; that his vendors were aware when they sold to him of the defects in their title and knew that they were selling lands not in the parish of St. Martin as they pretended, and that, therefore, they were liable *in solido* for all damages caused by their wrongful act, consisting of the amount spent as aforesaid on the faith of said title in working said property, say the sum of seven hundred and fifty dollars, the absolute loss of petitioner's time during the years 1893 and 1894, say six hundred dollars (\$600), the costs of suit incurred in the suit of Hiriart and Barker and actually paid by him, and the fees of the attorneys employed by him in said suit, say two hundred dollars, besides additional loss of time, expenses, vexation and fees of attorney in the institution of the suit then brought, say two hundred dollars. They prayed for citation to Martin and Broussard; that petitioner have judgment against them, declaring the sale made by them to him an absolute nullity, or in the alternative, annulling, avoiding and setting aside the same and relieving petitioner from all liability resulting therefrom, particularly the payment of the note by him furnished for the credit portion of the price of purchase, and that they be condemned to pay to him the sum of nineteen hundred and ten dollars, it being the aggregate of amounts as above set forth.

Defendants denied that their title to the property sold was bad—on the contrary, they averred it was well and truly theirs; that they purchased the property on the 18th of July, 1892, at a sale made by the sheriff of the parish of St. Martin, *ex-officio* tax collector, for the collection of the unpaid taxes thereon due, and which were legally assessed thereon for the year 1891, and for costs after due publication and prescribed notices and delays. That the assessment of said taxes thereon by the parish assessor of St. Martin in the name of James D. Denegre was legal and in conformity with existing laws. They averred said property to be in the parish of St. Martin and that it continued to be assessed in that parish. They averred that the suit against the plaintiff by Hiriart and Barker was collusive between the parties thereto and intended to throw a cloud upon the ownership of Martin & Broussard of the property and to illegally impede them in the enforcement of their rights. That Hiriart and Barker had thereby slandered defendants' title and damaged them to the sum of five hundred dollars. They recognized their legal obligation to defend the title they conveyed to the plaintiff and averred that in order to do so the claims and pretensions of Hiriart and Barker should be passed upon contradictorily with defendants. They prayed that they be made parties to the suit and that there be finally judgment rendered, decreeing that the property was situated in the parish of St. Martin; the assessments thereof in that parish were legal and correct; that the claims and pretensions of Hiriart and Barker were unfounded; that defendants, Martin and Broussard, were owners of the land in litigation, and that Hiriart and Barker be condemned to pay them five hundred dollars as special, actual damage. Hiriart and Barker having been cited, appeared and excepted that defendants, Martin and Broussard, were not in possession of the property and could not maintain a jactitation suit against them; that they could not join a jactitation suit with a petitory action; that they could not institute a suit for damages against them, as they were residents of the parish of Iberville and the court for St. Martin parish was without jurisdiction. Under benefit of their exceptions they denied specially that the land in question was situated in the parish of St. Martin or assessed therein, prior to 1891. They averred that the assessment of the property made in that parish in 1891 was illegal; they denied that James D. Denègre, in whose name the property was then and there assessed, ever had

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a recorded title in the parish of St. Martin. They averred that at the time of said assessment James D. Denègre had been dead for many years; that neither his administrator, heirs or assigns were notified of said assessment; that the advertisements and sale were illegal, tortious, erroneous and fraudulent and no valid tax sales of said lands could be made thereunder, and the pretended tax title was null and void. They specially denied that Martin and Broussard, or the plaintiff their vendee, ever sought to have their pretended title confirmed and approved, or were ever put in possession under the law by the sheriff, by a judgment of any court of competent jurisdiction; that the price paid by the plaintiff for the said lands was much less than the actual value of the lands to the knowledge of all parties; that they are and were mere trespassers on those lands; that the lands belonged to themselves (Hiriart and Barker), Barker having bought them from the heirs of James D. Denègre by act of record in the parish of Iberville; that Hiriart purchased an interest from defendant; that they held the patents for these lands issued to James D. Denègre; that they had paid all the taxes on the said property since the date of their purchase, and especially the taxes of the year 1891, for which the said lands were sold in the parish of St. Martin; that the adjudication, therefore, to the State of Louisiana was null and void, and no valid tax sale could be made in 1892. Assuming the position of plaintiffs in reconvention, Hiriart and Barker averred that the effect of the said illegal sale and acts of Martin and Broussard was to throw a cloud on their title; that the lands were all valuable timber property; that their title had been slandered, and they had been put to heavy expenses by the acts of Martin and Broussard, especially the pending unjust suit; that their property had been trespassed upon and depredations committed thereon; that they were entitled to special, actual and vindictive damages against Broussard and Martin *in solido* for their acts, including expenses and attorneys' fees in the pending suit in the sum of twelve hundred dollars. They prayed that the suit of Martin and Broussard against them be dismissed; that the lands be decreed to be situated in the parish of St. Martin; that they have judgment in reconvention against Martin and Broussard *in solido* for the sum of twelve hundred dollars, with legal interest from the date of judgment. They subsequently averred that the property in controversy was worth one thousand dollars; that they were the owners of the same, and they prayed to be so decreed

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The court rendered judgment in favor of the plaintiff Gathe against Martin and Broussard, annulling their sale to him of the land described in his petition, canceling the note which he had given in representation of the credit portion of the price of sale, and condemning them to pay him two hundred dollars, the amount which he had paid to them cash at the passing of the act of sale. The court rendered judgment in favor of Barker and Hiriart and against Broussard and Martin, recognizing and maintaining their title to the property involved in the litigation, and quieting them in their possession of the same, and rendering judgment further in their favor, annulling the title of Broussard and Martin to said land. The court further decreed that all claims for damages be rejected.

Broussard and Martin obtained an appeal, which they did not perfect; Hiriart and Barker have appealed and given bond.

The opinion of the court was delivered by

NICHOLLS, C. J. Broussard and Martin are before this court simply as appellees in the matter of the appeal taken by Hiriart and Barker. They have filed no answer and asked no change in the judgment against them in favor of the appellants. The only issue therefore before the court is whether the judgment of the District Court rejecting Hiriart and Barker's demand for damages against Broussard and Martin be correct or not. (See the case of Talle vs. Monasterio, 48 An. 1233.)

Appellants ask that we pass upon the question whether the property involved in this suit be situated in the parish of St. Martin or in the parish of Iberville, but that question was not a direct or substantive issue in the case; it was only incidentally before the lower court in connection with the issue before it, which was as to whether the title to Broussard and Martin, under a tax sale in St. Martin parish in enforcement of a tax assessed there in the name of James D. Denègre, was legal or not. When the issue with which it was connected was disposed of the incidental question disappeared from the case. There are no rights of the parties dependent upon an adjudication upon it and we scarcely think its consideration would have been necessary, even had the legality of the tax sale itself been brought before us for decision. An examination of the record in this case discloses nothing which,

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in our opinion, calls for a reversal of the judgment of the District Court upon the question of damages as being justly demandable by Hiriart and Barker from Broussard and Martin. Broussard and Martin bought the property in litigation at public auction at a tax sale. They subsequently sold it to Gathe, the plaintiff in this suit. The latter took possession under his purchase and through his employees, deadened and cut down a considerable quantity of timber upon the land. When so engaged Hiriart and Barker brought an action against him claiming ownership of the land, as well as that of the timber which had been cut. The pleadings filed by them in that suit are copied in this record, but those of the defendant Gathe have not been produced. The judgment in the case was in favor of Hiriart and Barker against Gathe, decreeing the land in question, and also the timber which had been cut, to belong to them. The present suit followed. Broussard and Martin's whole connection with the property seems to have consisted in their having purchased it at tax sale and subsequently sold it to Gathe, and in their having brought Hiriart and Barker into the present suit as parties. They should not have been called into the suit. Though the question of title to the property was, as between Gathe and his vendors, left open incidentally to inquiry in determining the personal responsibility of the latter in warranty, for the reason that they had not been notified by him of the suit brought to evict him (C. C. 2517, 2518), the issue as to the ownership of the land had been definitely disposed of by the judgment in the action between Gathe and Hiriart and Barker. Broussard and Martin could not reopen it in the present suit. Hiriart and Barker should have insisted at once that the matter had, so far as they were concerned, been closed by the judgment in their favor, and declined in the premises any further investigation into their rights. We think, however, that Broussard and Martin acted in perfect good faith in making them parties, under the impression that not having been direct parties to the suit in which the judgment had been rendered, the question of the title was still at large open to inquiry by themselves, contradictorily with the plaintiffs in the first action. We do not think they are chargeable in favor of Hiriart and Barker with attorney's fees. Even if they were, the record would not have furnished us evidence upon which we could fix the amount of such fees. It is true that when testimony has been taken upon that subject, courts are not only authorized, but it is

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their duty to bring to bear their knowledge of the value of the services of counsel from an examination of the record in which they were rendered, but they will not and should not, where no evidence at all has been taken, attempt to fix such value, even by consent and request of litigants. *State ex rel. Abraham vs. Judges*, 45 An. 889.

Finding no error in the judgment appealed from, it is hereby affirmed.

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120 437

No. 12,897.

STATE OF LOUISIANA VS. S. M. TAYLOR ET AL.

Motion to Dismiss.—Although the error complained of is one more properly within the supervisory jurisdiction of this court, but as the ruling of the trial judge, if error, finally, in effect decides the cause against the State, the court exercised jurisdiction on appeal.

On the Merits.—Where it appears that the person injured is not the person named in the indictment the variance is fatal to the indictment.

A PPEAL from the Fourth Judicial District Court for the Parish of Caldwell. *Machen, J.*

M. J. Cunningham, Attorney General, and *C. P. Thornhill*, District Attorney, for Plaintiff, Appellant.

S. H. Gilbert for Defendant, Appellee.

Submitted on briefs January 23, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

BREAUX, J. The State is the appellant in this case from the ruling of the trial judge refusing to permit the prosecuting officer to amend the indictment by changing the surname of the one injured from Leo to Willis (McDonald). The motion to amend was filed, tried and decided two days prior to the day fixed for trial of the cause.

As to the facts, the District Judge states as part of the bill of exception, that the defendants went into the field of Willis McDon-

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ald, where he and his son Leo McDonald were at work, and that in the presence of the latter and others they shot Willis McDonald.

That the amendment asked for sought to substitute Willis McDonald, upon whom the offence was committed, to Leo McDonald, upon whom no offence was committed; that the amendment was one of substance and not of form.

On the part of the prosecution the reverse was urged; that it was an amendment in matter of form and not of substance.

The defendant in this court filed a motion to dismiss the appeal on the ground that the appeal was taken from an interlocutory decree before the trial of the cause.

In the alternative, should the court take cognizance of the appeal the defendant avers that the motion to amend filed in the court below was a motion changing completely the identity of the one alleged to have been injured.

ON MOTION TO DISMISS.

An appeal is made to this court to review the ruling of the lower court made on a preliminary question before trial, sentence and judgment.

Although in our view the better practice is to bring up questions of error in criminal cases, prior to sentence and judgment of the court, under our supervisory jurisdiction, yet when the ruling, if erroneous, would illegally put an end to the prosecution, the court may entertain jurisdiction on appeal.

MOTION TO AMEND THE INDICTMENT.

The facts sustain the ruling. The purpose was to substitute another person to the one it was charged, had been injured, and not to correct a name or surname for the purpose of more complete identification. The amendment sought was one of substance and not exclusively one of form. Where it appears that the person injured is not the person named in the indictment, the variance can not be amended. Wharton, par. 258, Vol. 1, 7th Ed.

The appeal is denied; on the merits the ruling of the lower court is sustained.

The judgment of the District Court is affirmed.

Flower, King & Putnam vs. Myrick.

No. 12,366.

FLOWER, KING & PUTNAM VS. J. R. MYRICK.

INTERVENTIONS OF MISS OLIVE RUTH MYRICK AND BEN MYRICK.

No Collation was Due.—Plaintiffs sought to foreclose their mortgage, *via ordinaria*. The intervenors claimed that they owned the property mortgaged by inheritance from their mother.

At their majority they accepted the succession.

The tutor of intervenors administered the property and received rents and other revenues for the minors, for which he failed to account.

The intervenor was without authority to require collation of amounts not donated by the mother (the mother at her death was not even a creditor of the co-heirs).

The indebtedness of the co-heir, of whom collation was demanded, was to the tutor of the minor, and not to the succession of the mother.

Conceding that the co-heir was indebted to the succession—a debt incurred since the succession was opened—the portion of each heir in the realty was not subject to reduction (as against a third person) in order to equalize the shares.

The co-heir had the right to mortgage his portion to the plaintiff free from any claim for collation.

Amendment on Appeal.—The answer to the appeal was not filed in time. Moreover, the defendant was not a party to the appeal, and therefore appellee's prayer to amend the judgment was not granted.

A PPEAL from the Sixth Judicial District Court for the Parish of Richland. *Ellis, J.*

H. P. Wells for Plaintiffs, Appellees.

J. W. Willis for Intervenors, Appellants.

Argued and submitted January 22, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs brought this suit, *via ordinaria*, against the defendant to recover an amount of eighteen hundred dollars secured by mortgage, and an additional amount unsecured by mortgage.

Miss Olive Ruth Myrick filed an intervention alleging that plaintiffs' mortgage is a nullity for the reason that the mortgagor was not the owner of the property; that it was held at the time in indivision

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by her and her co-heir, the mortgagor; that it had not been under the administration of her tutor, who never made any settlement of his tutorship, or rendered any account; that he, the tutor, owes her in collation more than the value of the half of the property mortgaged and owned by her and her co-heir in indivision, as just stated.

She averred that her claim is due by the succession and that it should be paid in preference to any debt of her co-heir, J. R. Myrick, the mortgagor, who has fraudulently mortgaged property in which he only had an eventual or contingent interest, and not an absolute right, and that this was known to plaintiff.

She also averred that there are other claims than her own, which also have a preference on the succession property. She asks that the place mortgaged be sold to effect a partition and liquidation of the succession between her and her co-heir, the mortgagor, and that he be condemned to collate whatever amount he may have received in excess of his share, and that after settlement of all claims, including the collation which she claims, and after proper deduction from the active mass, that the *residuum* be divided equally between her and her co-heir; that plaintiffs' mortgage be restricted to the half of the *residuum* which may, after a full settlement of the succession, fall to her co-heir, the defendant. She alleges, also, that her tutor died insolvent.

Ben Myrick also intervened and reiterated the grounds upon which Olive Ruth Myrick based her intervention, and further claimed a large amount due him by the succession of Martha E. Myrick for the support of the minor Olive Ruth Myrick, which the tutor had failed to provide, although the revenues of the minor received by him were ample to defray all expenses for her support and education.

The plaintiffs, in their answer to the petitions of intervenors, pleaded the general denial, and specially pleaded that Miss Olive Ruth Myrick had accepted the succession of her mother, after her majority—that any claim due her by the succession was in consequence extinguished by confusion. They pleaded the prescription of three years.

It is admitted that at the date of the death of Mrs. Martha E. Myrick, mother of Miss Olive Ruth Myrick, she owed no debts. We are informed that E. Myrick, tutor, collected rents and other revenues, which he diverted from the credits of the minors; and

expended in his own business ventures, and that they were finally squandered and lost. That these revenues from the year 1876 amounted to about eight hundred dollars per annum; that the defendant, J. R. Myrick, received board and clothing valued at one hundred and twenty dollars per annum, while the other minor, the intervenor, did not receive anything. Her support and education were paid by her under-tutor.

It appears that all the debts were incurred after the death of Mrs. Myrick, and during the time that the tutor had the administration of the property.

The judgment of the District Court recognized plaintiffs' claim against J. R. Myrick, and the mortgage held by them was decreed executory as to the property described in their petition.

The demand of the intervenor for the settlement of the succession of her mother, Mrs. M. E. Myrick, and for collation by her co-heir of such sums as he may have received in excess of his share of the rents and revenues, was rejected, as to plaintiffs. The intervention of Ben Myrick was sustained against the interest of Miss Olive Ruth Myrick on the proceeds of the sale of the place mortgaged, to the amount of his claim.

The place mortgaged was decreed to be sold to effect a partition, and it was ordered that plaintiffs be paid out of the undivided half of the proceeds, and the claim of intervenor, Ben Myrick, out of the other half, and the *residuum*, if any, to be equally divided between the two owners—the costs to be paid by preference.

In this court, during the argument on appeal (after counsel for the intervenor had closed his argument), the appellee offered to file his answer to the appeal, in which he prayed for an amendment of the judgment. Counsel for appellant objected to the filing as too late.

It is true, as alleged, that Miss Myrick, intervenor, and her brother, the defendant, at their majority, accepted the succession of their mother, who died in 1876. A few days after her death her brother, Ed. Myrick, qualified as tutor of her minor children; Ben Myrick, an uncle, who is an intervenor here, qualified as their under-tutor.

It is insisted by Miss Myrick that the succession of Mrs. M. E. Myrick, her mother, was the "donor;" that J. R. Myrick secured some advantage from the rents and other revenues of the succession property, which he is bound to collate.

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The mere definition of collation of the Civil Code, we think, is a complete answer to this proposition.

The children or grandchildren must collate what they have received from their fathers, mothers or grandparents. C. C. 1228. In the case before us the children had not received any donation for which they were accountable, and owed no debts to their mother. As heirs they could not, therefore, be called upon to collate anything to the mass of the succession as left to them by their mother.

We think this provision of the Code meets the proposition of intervenors, and that, as a mere matter of collation under the articles of the Code relative to that subject, the co-heir could not be called upon to collate.

But the intervenors urge that the law contemplates perfect equality among co-heirs, and that, in consequence, each should be held bound to return to the succession sufficient of the amounts that he has received from the succession to equalize the shares.

In the first place we think it evident that the funds having been misapplied by the tutor, while the property was under his administration, the tutor thereby became indebted, and not the succession from which the funds were realized. In short, they were the debts of the tutor and not of the succession. If the facts be as we think they are, this completely solves the question, for we are certain no one will contend that the succession is bound for amounts received by the tutor for account of his ward. If we should concede that it is a debt of the co-heir incurred since the death of his mother and due by him to the succession, his debt would only be, at most, an ordinary indebtedness, one entirely unsecured as to the creditor by mortgage or privilege of any kind.

The co-heir who is an ordinary creditor of his co-heir has no real right on the property of the succession; he can only exercise a personal action against his debtor; he can not, by reason of his claim, have himself decreed the owner of a larger portion of the immovable property in the partition. Fuzier-Herman, Vol. 2, p. 187, No. 34.

The other intervenor, Ben Myrick, is also without a *locus standi* in the case.

He was not a creditor of the succession, but of the tutor, for the support, maintenance and education of the minor. As an undertutor he is not in a position to claim anything from the succession

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from which the tutor has collected amounts for which he should have been compelled to account to his ward.

The failure of the appellee to timely file his answer gave rise to the last question before us for our determination.

The offer to file the answer at the time it was tendered to be filed is as if no answer had been offered.

We are authorized to amend judgments at the instance of the appellee only upon answers filed within the time prescribed.

Moreover, the defendant is not a party to the appeal. It is not possible to amend a judgment against a defendant (who has not appealed and who is not made a party). The controversy on appeal was between the plaintiffs and intervenors. *Barrett vs. Donovan*, 17 An. 182.

The judgment is affirmed.

MR. JUSTICE MILLER recused.

No. 12,363.

WHITED & WHEELLESS, LIMITED, vs. W. H. BLEDSOE, ASSESSOR,
ET AL.

The readiness for immediate use of an article of wood which is manufactured has been uniformly held the test of constitutional exemption from taxation.

APPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

Joannes Smith and Leonard & Randolph for Plaintiffs, Appellants.

M. J. Cunningham, Attorney General, and *A. J. Murff*, District Attorney, for Defendants, Appellees.

Argued and submitted January 20, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

WATKINS, J. The plaintiff is a limited corporation engaged in the operation of a planing mill, and claims that the plant and property

49	325
110	439
49	325
119	639

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are exempt from taxation under the provisions of the two hundred and seventh article of the Constitution and the amendment thereof, on the ground that it is engaged in the manufacture of "articles of wood," and from a judgment rejecting its demand the corporation has appealed.

The averment of the plaintiff's petition is, that said planing mill and machinery was assessed at three thousand dollars for the year 1896, and that the assessment is illegal and void, because of the aforesaid exemption. That said planing mill has been and is now engaged in the manufacture and "production of dressed lumber, planed, tongued and grooved, planed weather-boarding dressed and ready for general use, and mouldings (of different kinds). That same are manufactured by said machine out of lumber and are complete in themselves, ready for immediate and general use without further manipulation or work on them."

The assessor and board of reviewers, in their answer, deny "that the machinery asked to be exempt is used or employed in the manufacture of articles of wood complete in themselves," but they, on the contrary, aver that it simply dresses and tongues and grooves rough plank as same is turned out from the saw-mill.

That, consequently, the plaintiff's exemption should be denied.

The following is the substance of the admissions agreed to by counsel, viz.:

1. That more than five hands are employed in operating the planing mill and machinery.
2. That the mill and machinery are engaged in dressing rough lumber into plain and tongued and grooved weather-boarding, flooring and ceiling; and also in making mouldings, door and window casing, base boards and wainscoting.
3. That all articles of wood are made from rough lumber, and that this lumber is sawed in lengths ranging from eight feet up to the multiples of two feet.
4. That some are cut in special lengths on special request.

The witnesses at the trial say, generally, that while the articles prepared are ready for immediate use, that the window-casing and door-casing are not cut into special lengths required for doors and windows when they leave the mill; but same have to be sawed or cut into proper lengths by the carpenter and builder, and that this is true of all the lumber which the plaintiff manufactures.

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Further, that after same is thus cut into proper lengths it has to be put together by (a) carpenter, and used in the construction of buildings. One of the witnesses of the defendant—an experienced carpenter—says:

“Ordinarily, a piece of flooring, ceiling, moulding, etc., as turned out of the mill, has, of course, to be cut for use. * * * One is as complete for the purposes for which it is intended as the other. Both have to be cut into proper lengths, but never (to) change the form. A piece of ceiling turned out from the planer, without being attached and worked into other lumber, would not be an article complete within itself.”

Again: “Ceiling, flooring, and siding, where it does not have to be cut to get the proper length, have to have their ends (sawed off) to be squared, to make a neat joint.”

The foregoing is a fair synopsis of all the testimony; and, thereupon, the question for decision is: Is plaintiff's property engaged in the manufacture of articles of wood in the sense of the Constitution, entitling it to an exemption from taxation?

What are the articles of wood that plaintiff manufactures? Its petition enumerates lumber which is planed, dressed and tongued and grooved, such as weather-boarding and moulding of different kinds. The process is that of transforming rough sawed lumber into weather-boarding, flooring and ceiling. But no definite fixed shape or dimensions are given to the dressed or planed lumber. When turned out of the planing mill it is not in a condition for *immediate use* without further manipulation or work thereon; but it is necessary for same to be cut into special lengths to suit a given purpose or use and afterward put together by the carpenter or builder.

Taking up the adjudicated cases and examining them, we find that *the readiness for immediate use* has been, uniformly, made the test of exemption. In *Jones vs. Raines*, 35 An. 998, this court interpreted the words “articles of wood” to mean “such as furniture or other like articles;” or, in other words, “that the articles of wood contemplated by the Constitution were articles which, like furniture, were made from timber, either sawed or cut.”

In *Martin vs. New Orleans*, 38 An. 397, the exemption claimed was that of a saw-mill engaged in cutting planks from timber prepared for the purpose, and afterward converting it “into articles of wood, such as doors, sash and blinds, boxes, laths, etc., necessary for the

Whited & Wheelless, Limited, vs. Assessor et al.

constructions of buildings, and put in shape and style ready for immediate use."

And citing the authorities and applying them to that case the court said:

"It is manifest that the property of whatever nature which is used in the saw-mill business proper—that is, in the manufacture of raw material, namely: of lumber not ready for use as are furniture and other articles of wood, is not exempt from taxation.

"The case is different, however, as to the property which is used for the manufacture of articles of wood, ready for use by the consumer."

In that case the court considered that sashes, doors and blinds were such articles of wood as were contemplated in the Constitution and held them to be exempt from taxation.

In *Carre vs. City*, 41 An. 996, the court cited the foregoing authorities and said:

"The articles of wood mentioned in the article of the Constitution are, therefore, those which, like furniture, are intended for separate use and are ready for use by the purchaser without further manipulation or labor on them, namely, which are complete in themselves."

And, in emphasizing that statement, they said:

"It is evident that the cabins and planks manufactured by the plaintiff are not articles of wood within legal intendment."

In *Lumber Co. vs. Sheriff*, 45 An. 456, the proposition was again emphatically announced thus, viz.:

"The testimony shows that the corporation makes shingles, laths, bridge material, fence posts, railroad ties, wood products ready for use as they come from the mill without any further manipulation. They also make the parts of common plantation cabins, the sills, joists, studding and rafters sawed to the specified lengths, and can be used in the construction of cabins without further manipulation."

And, finally, in *Brooklyn Cooperage Co. vs. City*, 47 An. 1314, it was held that "the importer of staves, already bent so as to form a barrel, of barrel heads ready for insertion and hoops to be driven on, is not to be deemed a manufacturer of a barrel, merely because he substituted machinery for the usual hand labor of setting up staves in barrel shape," etc.

And the court held that machinery thus employed was not exempt from taxation.

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Applying the principles announced in the decisions cited to the facts of the instant case our conclusion is that the property and machinery of the plaintiff are not engaged in the manufacture of articles of wood in the sense of the Constitution and are consequently not exempt from taxation.

Judgment affirmed.

BREAUX, J., recuses himself.

No. 12,362.

THE STATE OF LOUISIANA VS. MONROE EVANS.

A verdict of "guilty of breaking" does not respond to the terms and essential ingredients of any statute of this State denouncing burglary as a crime.

APPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Hunter, J.*

M. J. Cunningham, Attorney General, and *Phanor Breazeale*, District Attorney, for Plaintiff, Appellee.

Julius F. Ariail for Defendant, Appellant.

Submitted on briefs January 28, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

WATKINS, J. The defendant, having been indicted for the crime of burglary of a dwelling house in the night-time and convicted of *breaking*, and sentenced to three years' imprisonment in the State penitentiary at hard labor, prosecutes this appeal, relying on several bills of exceptions relating to the proceedings incident to the trial, a motion for a new trial and one in arrest of judgment.

The principal question, and one which is covered by two bills of exception—one of which relates to an alleged improper instruction to the jury, and the other to the declination of the trial judge to sustain a motion in arrest of judgment—is grounded upon the

verdict of the jury, which is as follows, viz.: "We the jury find the prisoner guilty of breaking." (Signed) "P. S. Jarreau, foreman."

The record shows that after the jury had been charged and had retired to their chamber for deliberation upon their verdict, the judge, upon his own motion, sent for them and gave them an additional instruction to the effect that if the facts justified it, they could find as a verdict "guilty of breaking;" and that the defendant's counsel reserved a bill of exceptions: 1st, to the act of the judge in thus recalling the jury; and, 2d, to the instructions he gave them. It further shows that after the rendition of the verdict defendant's counsel moved to arrest the judgment of the court upon the ground that same "is not responsive to the charge contained in the indictment and is absolutely null and void in that there is no crime or offence known to the law such as 'breaking in the night-time.'"

It further shows that the grounds of exception are fully set forth in the bill of exceptions which defendant's counsel presented to the court, as follows, viz.:

"To which ruling and judgment of the court, defendant * * * excepted, for the reason that the evidence on the trial of this case showed that there was no entrance by the accused * * * into the dwelling house designated in the indictment, either before or after the alleged breaking; which breaking, if any, was committed *in the night-time*, and reserved this his bill of exception," etc.

And it finally shows that the trial judge made the following assignment of reasons for the ruling, namely:

"Whether there was any entrance or not was a matter of fact passed upon by the jury. I thought the verdict correct, and for that reason overruled the motion."

In effect the trial judge held that the verdict was well-grounded in law.

The indictment charges that the defendant "did wilfully, maliciously, feloniously and burglariously, *in the night-time* of the day aforesaid without being armed with a dangerous weapon, *break and enter* the dwelling house of Mrs. S. A. Dawson with the intent to commit murder, and steal and and rob," etc. (Italics ours.)

Comparing the phraseology of the indictment with that of Revised Statutes, Sec. 850, under which the Attorney General says the

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indictment was found, we find the following to be the wording of the latter, viz.:

"Whoever, with intent to kill, rob, steal, commit rape, or any other crime, shall *in the night-time break and enter*; or having, with such intent, *entered in the night-time*, break a dwelling house, any person being lawfully therein, and such offender being at the time of such breaking or entering armed with a dangerous weapon, or arming himself in such house with a dangerous weapon, or committing an assault upon any person lawfully being in such house * * * on conviction shall suffer the punishment of death."

That of Sec. 851 is identical with that of 850, except that it says "without being armed with a dangerous weapon, or without arming himself in such house with a dangerous weapon, and without committing an assault upon any person lawfully being in such house;" and the maximum punishment therefor is imprisonment at hard labor for fourteen years.

That of Sec. 852 is, likewise, identical with that of the latter, except that it is restricted to the breaking and entry into a shop, store, etc.

These three sections are somewhat amplified by that of 854, which declares in general terms that—

"Whoever, with intent to rob, steal, commit a rape or any other crime, shall *in the night-time enter without breaking or in the daytime break*, or *enter any dwelling house* or outhouse thereto adjoining and occupied therewith, or any office, shop or warehouse, etc. * * * shall be imprisoned at hard labor not exceeding five years."

The italicized paragraphs of the foregoing sections will direct attention to the salient parts in making a comparison; and they clearly show that the crime of burglary is based upon the act of *breaking and entering in the night-time* a house of some description, except the last one.

And it declares that "whoever, with intent to rob, steal, commit a rape or any other crime, shall *in the night-time enter without breaking*;" or whoever, with intent to rob, steal, commit a rape *in the daytime, break or enter any dwelling house*," etc.

Dividing the section into two parts, corresponding with the two offences denounced, it becomes apparent that the *former* is applicable to the indictment in the instant case, which charges the defendant

with the crime of burglary *in the night-time*; but that the latter is not, as it denounces burglary *in the daytime*.

There is no question of the fact that it is an indictable offence under this last section for one to *break* a dwelling house, or any store or shop with the *intent to rob, steal or commit a rape therein, in the daytime*; and that it is equally so to *enter* such a house for such a purpose in the daytime.

But the statute distinctly says "whoever, with intent to rob, steal, commit a rape, or any other crime, shall *in the night-time enter without breaking*," etc.

But, at all events, there could not be a burglary committed under either section, whether by a breaking and entering, or by breaking or entering, unless the *act* be accompanied by an *intent* to rob, steal, commit a rape, or some other crime.

The Attorney General has pointed out two decisions upon which he relies as affirming the proposition for which he contends.

In the first one—State vs. Miller, 45 An. 1171—we said: "The defendant was tried and found guilty of burglary without a dangerous weapon."

Again:

"The verdict finds the defendant guilty of a part of the charge, but passes upon the whole by qualifying that the act was committed without a dangerous weapon. * * * In thus limiting their verdict it is brought within the terms of the case of State vs. Morris, 27 An. 481, in which the issue decided is identical with that of the case at bar."

Referring to the case cited we find the statement quoted entirely correct.

The indictment in that case—State vs. Morris—charged that the defendant "did, *with intent to kill, in the night time break and enter* the dwelling house of Charles Coleman," etc., and the verdict of the jury was "guilty of *entering* the dwelling of Charles Coleman *as charged*, but without a dangerous weapon."

The principle decided in those two cases is, in our view, entirely correct, and we adhere to the opinion expressed therein, but they do not support the charge given or the verdict rendered in the instant case. A verdict which finds the defendant "guilty of *breaking*" does not respond to the terms of our statute. It should have found that the defendant "did feloniously break into a dwelling

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house in the night-time," as was done in *State vs. Newton*, 30 An. 1253.

In *State vs. McCort*, 23 An. 326, it was held that when an indictment charges a breaking and entering, etc., with intent to steal, the defendant may be convicted of *entering without breaking*.

But it was held in *State vs. Disch*, 34 An. 1184, that on an indictment for burglary defendant can not be convicted of a trespass.

The crime of burglary is statutory and our own decisions are controlling.

A careful study of the question has satisfied us that the defendant's motion in arrest was good and should have been sustained. The judgment and sentence pronounced must be arrested and the defendant discharged. He can not be put twice in jeopardy.

It is therefore ordered and decreed that the verdict and the judgment and sentence thereon based be annulled and set aside and the defendant discharged from custody.

No. 12,335.

J. P. DALFERES VS. VICTOR MAURIN.

In Matter of the Exception.—The demand gave notice, definite enough, to the defendant of the grounds of action. No motion was made for a bill of particulars. Nothing indicated, during the trial, that the petition did not sufficiently set forth the cause of action.

On the Merits.—The verdict of the jury and the judgment of the court are affirmed to the extent that the testimony shows they are correct.

In those particulars that plaintiff's testimony is not corroborated, the demand is dismissed as in case of non-suit.

A PPEAL from the Twentieth Judicial District Court for the Parish of Ascension. *Guion, J.*

Edward N. Pugh, Howell & Pugh, and *John Marks* for Plaintiff, Appellee.

R. N. Sims for Defendant, Appellant.

Argued and submitted January 6, 1897.

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Opinion handed down January 18, 1897.

Rehearing refused February 15, 1897.

The opinion of the court was delivered by

BREAUX, J. This suit was brought by the plaintiff on an account for two thousand three hundred and thirty-six dollars and seven cents.

The following exception to the petition was tried and overruled, viz. :

That the allegations are vague and uncertain; without specification as to time and place, and without informing exceptor of the nature of plaintiff's cause of action.

Subsequently the defendant, in his answer, pleaded a general denial.

The case was tried before a jury and a verdict rendered by the requisite number of nine, in favor of the plaintiff for the amount claimed.

A motion for new trial was refused, and written reasons given for the refusal.

The defendant prosecutes this appeal from the judgment.

First, as to the exception. The plaintiff in his petition sets forth the nature of his demand, the different amounts claimed, and the respective dates of the items of the account. In addition, plaintiff annexed the detailed account to his petition, which he alleged the defendant had acknowledged and promised to pay.

Moreover, it was not suggested during the trial that the averments were too vague to admit proof under them.

No bill of exception was reserved to the admissibility of testimony during the trial on grounds suggestive of vagueness of the petition.

This brings us to the merits of the case.

The learned judge of the District Court, in his written reasons overruling the motion for a new trial, was not favorably impressed by the evidence of plaintiff's manager, upon which he asserts the plaintiff relied for a verdict. He says that he failed on cross-examination to explain the various items of the account sued on, and that he could not detail them to the extent of naming the persons to whom the money was advanced for plaintiff's account nor the amounts advanced to each; that he invariably answered that

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he had on several occasions presented the items of account to defendant, and that the defendant acknowledged them to be correct and promised to pay them; that the defendant contradicted this evidence in every particular. That upon the testimony of these two witnesses the case went to trial, except that there were other witnesses who testified that defendant had instructed plaintiff's manager to advance certain amounts to other persons, although defendant swears that he did not so instruct him.

The judge explains that he did not consider, under the circumstances, that he had the legal right of reversing the finding of the jury, and supported his ruling by quoting from the work of Mr. Proffat on jury trials, which reads: "There must be palpable, unmistakable error, before the court is authorized to set aside a verdict."

As a preliminary to a review of fact, in this case, we will state that which no one denies: Proof is not admissible without plea pleaded, that the consideration was *contra bonos mores*; the only question before the court is the indebtedness *vel non* of the defendant.

We will also state, in passing, that we are not entirely in accord with the views expressed by our learned brother of the District Court, for whose good judgment we entertain the highest regard.

It is true that the authority to set aside a verdict should be sparingly exercised, and in mere questions of fact the court always interferes with hesitation and reluctance.

None the less, where the verdict of a jury is clearly against the weight of the evidence, a new trial should be granted by the judge before whom the case is tried.

We affirm, however, that which was said in the "written reasons" of the court *a qua* (in so far as relates to uncorroborated testimony) for overruling the motion for a new trial:

"The corroboration of other testimony was needful."

The testimony of the defendant unqualifiedly contradicted the testimony of the manager of plaintiff's business. But to the extent that the testimony of plaintiff's manager is sustained by other evidence, we think that the verdict of the jury and the judgment of the court should be affirmed.

The effect of the general negation, of all indebtedness, of the defendant as a witness is counteracted and neutralized by the cor-

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roborating testimony of plaintiff's other witnesses (than his manager).

This leads us to an investigation of the facts, to ascertain in what particular they are corroborative.

In addition to the testimony of the manager that six hundred dollars of the account were due, and had been acknowledged as due by the defendant, Max Dupaty, not shown by the record to have had any interest in the controversy, testifies that plaintiff was indebted to him in 1895 in the sum of six hundred dollars.

He asked the defendant if he would accept a draft of plaintiff in favor of the witness for that amount. Defendant declined to accept, but said: "I owe him that amount or probably more, but that is not our agreement and I don't know what I will owe him at the end of the year."

The witness Dupaty also testified: "I know that he owed that amount."

We are also of the opinion that the item of fifty dollars paid to Mathieu merged in the cash charged, is due for the reason that with enough particularity the manager as a witness details how the indebtedness arose. It was, we think, incumbent upon the defendant to rebut this testimony by more than his sworn denial. It was not shown that Mathieu, the creditor, had left and was not within the reach of the court's process.

To the additional amount of thirty-eight dollars there is also corroborative testimony; making a total of six hundred and eighty-eight dollars (\$688). There is ample testimony of record sustaining the claim made that defendant gave orders to plaintiff's manager to pay for his account to different persons. This testimony, we think, is corroborative to the amount of the indebtedness we consider proven.

The weight of the evidence, we think, sustains the correctness of the verdict and the judgment of the court to this amount. The record presents facts and testimony sufficient to a decision upon the items stated. As to the remainder of the account, to-wit: thirteen hundred and fifty-eight dollars and seven cents (\$1358.07), we think that the testimony does not sustain the verdict.

"It may become the duty of the appellate court to pronounce on a question of fact in direct opposition to the verdict of a jury. *Hosea vs. Miles*, 18 L. 107, 110.

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The decision just cited and the decisions in *Collins vs. Hamilton*, 14 L. 343; *Miller, Lyon & Co. vs. Coppel & Curry*, 39 An. 381, justify us in rendering a final judgment in this case in so far and to the amount the evidence and facts of record enable us to pronounce such a judgment.

As it may be that the plaintiff or his manager may explain the items of their account and support them by sufficient testimony we dismiss the demand for the balance of fourteen hundred and eight dollars and seven cents (\$1408.07) as in case of non-suit.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the amount from two thousand and ninety-six dollars to six hundred and eighty-eight dollars (\$688).

As amended the judgment appealed from is affirmed at appellee's costs on appeal.

No. 12,398.

STATE EX REL. ELLEN JOHNSON VS. JUDGES LEAKE AND THOMPSON,
OF THE FOURTH CIRCUIT COURT.

Where after the selection of a member of the bar to aid in the decision in respect to which the judges of the Court of Appeals disagree, one of the disagreeing judges retires and his successor enters on the duties of the office, the functions of the selected member of the bar ceases. He must act with the two judges and can not act at all unless they disagree. Constitution, Art. 101; Amendment Acts 1882, No. 125, p. 174.

ON APPLICATION for Writs of *Certiorari*, *Prohibition* and *Mandamus*.

W. B. Kemp and O. N. Ogden for Relatrix.

Respondent in *propria persona*.

Submitted on briefs January 23, 1897.

Opinion handed down February 1, 1896.

The opinion of the court was delivered by

MILLER, J. The relatrix seeks to restrain the judges of the Circuit Court of Appeals for the Fourth Circuit from proceeding in the

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trial of an appeal from the judgment she recovered in the District Court for the parish of Tangipahoa.

The relatrix avers that on that appeal the judges of the Circuit Court disagreed, one of them being of opinion the judgment of the lower court should be affirmed, the other that the judgment should be reversed; that thereupon, in accordance with the Constitution, they selected a lawyer to aid in the determination of the case, the order for his appointment being spread on the minutes; that subsequently the term of office of one of the disagreeing judges having expired, his successor was appointed, who is now acting; that no decision having been reached in the case at the recent term of court, the rule was taken by defendant in the appeal to set aside the order appointing the member of the bar to act as judge, and at this point the relatrix conceiving that the order of the lower court for the appointment of the member of the bar could not be revoked, made the present application to this court.

The judicial function is to be performed by the judges elected or appointed, except when they can not agree; when that occurs, instead of allowing the judgment of the lower court to stand, the rule when this court was composed of four and that of the courts of appeal, until changed by the constitutional amendment, there is now the provision that a member of the bar shall be selected to aid the disagreeing judges of the Court of Appeals. Const., Art. 101; Amendment Acts 1882, p. 174, No. 125. This displacing of the judge to secure a decision arises from the necessity then existing. But if before any decision is reached in the case, to aid in the decision of which the member of the bar is called upon, that necessity ceases by the election of the judge to supersede one of the disagreeing judges, it is difficult to perceive any reason for the continuance of the functions of the member of the bar. It is urged in this case that the opinion of the superseded judge having been favorable to the relatrix, that fact entitles her to demand that the member of the bar shall continue in his functions. It is quite as apt to occur in a case like this that the opinion of the retiring judge would be against the litigant. Whether the case shall be determined by the two present judges, between whom there is as yet no disagreement, or with the aid of a member of the bar selected when in the then constitution of the court there was a failure to agree, is, it seems to us, not at all dependent on the opinion that may have been formed by

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the retiring judge. It is simply the disagreement of the two judges, not their respective opinions, that affords occasion for the interposition of another to aid in determining the controversy. Nor is it apparent that the litigant in this case is in any worse condition by referring her suit to the incoming judge. If the member of the bar could be deemed competent to act, and the incoming judge entitled to no participation, the opinion of the member of the bar, if in conformity with that of the judge, would give the relatrix the judgment. Her fate would thus rest with the member of the bar. If he disagree with the judge, the incoming judge being excluded, she would get no judgment, for there is no legal contemplation of a disagreement between one judge and the member of the bar. He is to act with two, not one judge. Amendment to the Constitution, Art. 101, Acts 1882, p. 174, No. 125. On the other hand, if the member of the bar is excluded because by the election of a judge since the disagreement of the court, then the litigant secures the aid of the new judge unbiased by any previous opinion; if he agrees with the other judge, the litigant is in the same condition as if the member of the bar had acted and concurred. And if the two judges disagree, then a final determination can be secured by selecting a member of the bar. It is further contended that the member of the bar once selected he becomes the umpire; that the power of the court with respect to the case is exhausted. The answer to this argument is the member of the bar is not an umpire. He is to concur with one or other of the judges. If in this condition of this case, the participation of the incoming judge was denied and there should be no concurrence of the other judge and the member of the bar, there could be no decision, for there is no umpirage known to the Constitution to adjust a difference between the member of the bar selected and a single judge. In our opinion the member of the bar chosen under Art. 101 of the Constitution as amended can act only in concurrence with the two judges of the Court of Appeals and can not act at all, unless the judges disagree. The functions of the member of the bar selected in this case, when the disagreement existed, ceased necessarily, when one of the disagreeing judges retired and his successor was elected.

The orders for the writs herein applied for are set aside and the application is denied.

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No. 12,355.

A. ELTRINGHAM VS. R. T. CLARKE AND R. W. PRINGLE.

The law recognizes that the order setting aside a sequestration on defendant's bond, resulting in compelling the resort by plaintiff to another suit for relief, or in other respects changing his position to his prejudice, may work irreparable injury, and is appealable, and to this class belongs the order to dissolve on bond the plaintiff's writ of sequestration issued to hold the property of a corporation subject to the adjustment of the rights of the co-proprietors to be made in the suit pending for that purpose. Code of Practice, Art. 566; 9 Martin, 801; 13 An. 581; 14 An. 57; State *ex rel.* Street vs. Judge, 85 An. 515; State *ex rel.* Roth vs. Judge, 88 An. 49.

When the corporate business is ended and nothing remains except to dispose of the corporate property by sale or division in kind to make the division between the co-proprietors in accordance with the adjustments of their accounts as corporators and co-proprietors of the property, one of them is entitled to a sequestration or other conservatory writ to prevent an arbitrary disposition of the property to his prejudice. Code of Practice, Art. 278; 38 An. 49; 2 An. 87. Nor is the right to this protection afforded by the conservatory writs affected by the fact that the property is in the hands of liquidating commissioners.

The court may *ex officio* direct the sequestration of property the subject of litigation when requisite to protect the rights of the litigants. Code of Practice, Art. 278; 35 An. 846.

A PPEAL from the Eighth Judicial District Court for the Parish of Concordia. *Dagg, J.*

Lazarus, Moore & Luce and Elam & Dale for Plaintiff, Appellant.

Boatner & Hough for Defendants, Appellees.

Argued and submitted January 19, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal by plaintiff from the order dissolving on the bond of defendants the sequestration obtained by him of the property of the corporation of which he and defendants were shareholders.

The plaintiff and defendants were substantially the owners of all the capital stock, the other shareholders being only nominally interested and introduced only to make up the number required to

49	340
51	146
49	340
52	1188
52	1183
52	1283
49	340
110	880
49	340
112	614
112	616
113	832
49	340
120	49
49	340
121	498

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organize a corporation. Its business, the execution of work on levees, proving unprofitable, the plaintiff and defendants agreed that, with the completion of the levee contracts then on hand, the business of the corporation should cease and a liquidation of its affairs should be effected. This liquidation proceeding under the control of all three of the parties to this suit, not resulting satisfactorily, a suit was brought by one of them, Pringle, for a dissolution and settlement of the business. But while that suit was pending, a corporate meeting was held, at which Pringle and Clarke, the two defendants in this case, adopted resolutions over the protest of Eltringham, the plaintiff, by which it was proposed to sell or divide the property of the corporation and liquidate its affairs, the liquidation to be conducted by the three parties, but the majority to control. At this meeting Pringle and Clarke voted together, and the plaintiff, by contrary resolution and his protest, placed himself in opposition. The effect of the resolutions was to dispense with the functions of the court invoked to settle the rights of the parties, and virtually subjected the plaintiff to that method of disposing of the corporate property, and adjusting his rights as his two associates acting in concert might determine. The plaintiff then appealed to the court. His petition averred the pendency of the suit to settle the partnership; that the resolutions of his fellow-corporators proposed to give to them the power of disposing of the corporate property by sale or division; that he disagreed with them as to the method of liquidation; that they had control and possession of the property, were about dividing it extra-judicially and illegally, it not being susceptible of a division in kind, only to be made if practicable, by the courts; that a settlement of accounts was necessary, and he prayed for a writ of sequestration and an injunction to arrest the action of the defendant. The writ issued and was executed; then there was an application by the defendants to bond, declined by the judge, but thereafter renewed was granted in the absence of the judge of the district, by the judge of the Sixth Judicial District Court, which embraces the parishes of Iberville, West Baton Rouge and Pointe Coupee. From that order the plaintiff prosecutes this appeal, and the defendants move to dismiss on the ground the order to bond can work no irreparable injury.

The Code implies the general rule that interlocutory orders are not appealable, but grants the appeal whenever the interlocutory

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order is calculated to work irreparable injury. The character of the the right sought to be protected by the sequestration determines whether the order dissolving the seizure is appealable. Where the demand of plaintiff is simply for debt secured by privilege, and his writ of sequestration is dissolved by the substitution of a bond for the property, no appeal lies, the bond affording him complete protection. Thus the case cited by defendants from 21 An., Wolff vs. McKinney, p. 684, and similar decisions, hold that the order to bond a sequestration for a money demand secured by privilege is not appealable. But it is entirely different when the plaintiff resorts to this writ for the protection of a right of property, and in our view this case is an illustration of that difference. The sequestration was auxiliary to the suit to settle the corporate affairs. The writ sought to keep the property subject to such judgment as the court might render between the co-proprietors of the corporate property. If this order to bond stands, the property is withdrawn from the control of the court. If the plaintiff in his demand for sequestration obtains relief he will have to seek, in some further proceedings, that remedy which is prompt, direct and complete, if instead of dissolving the writ the corporate property remains in the sheriff's hands to abide the orders and judgment for the disposition of the property and adjusting the rights of the corporators. When the bonding of the writ will compel the plaintiff to resort to another suit for relief it has been held the order to bond is appealable, and generally it may be stated whenever the bonding changes the position of the plaintiff in the writ to his prejudice he is entitled to appeal. To permit a co-proprietor to take into his possession and convert the joint property under his bond for its restitution changes the right of property for a circuitous and uncertain lawsuit on a bond, and in this case defeats that relief to be afforded in the suit to settle joint interests, the court having the property under its control. An order to bond leading to such results is, in our opinion, clearly appealable. The language of one of the decisions, in dealing with this question, is applicable, "the sequestration improperly dissolved might forever deprive the plaintiff of the object of his suit." State vs. Judge, 9 Martin, 301; see also Johnston vs. Johnston, 13 An. 581; White & Trufant vs. Cazenave, 14 An. 57; 35 An. 515; 38 An. 49. The motion to dismiss is therefore denied.

On the merits it is shown that the corporate business is ended.

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There are no debts to be paid, or if there are we infer there are funds for their payment. All that remains for the settlement of the corporate affairs is to adjust the accounts of the corporators and to distribute the corporate property or its proceeds if a sale is requisite. The charter provides for three commissioners to liquidate the corporation. The resolutions provide for three, but practically gave the control to two, and that in view of the relations of the parties shown by the record, is practically the exclusion of the plaintiff. We do not appreciate that the liquidating officers of a corporation have arbitrary power to dispose of the property committed to their charge. The law protects the interest of each of the co-proprietors. It might well be that a division in parts of a plant, such as this corporation possesses, would be to sacrifice the property, and a sale in its entirety, the only proper division. The law provides for one or the other method in partition between co-proprietors. Civil Code, Arts. 1339 *et seq.* When the partition is in kind there is the provision in the Code for lots to be drawn, and so composed as to secure equality in the division. Arts. 1364 *et seq.* The resolutions in this case giving the power of disposition to the two commissioners, the allegation in the petition is, that they propose to make an illegal and arbitrary division. A disposition of the joint property violative of the rights of one of the co-proprietors would, in our view, authorize a resort to the writ of sequestration. The import of the petition is that the commissioners propose to divide the plant when that division would be injurious to plaintiff, and to divide as suited them, the plaintiff to submit to any allotment they choose to designate for him. We think the law afforded plaintiff protection by its conservatory writs against any such procedure. These resolutions were adopted in the face of the pending suit to settle the corporate affairs. The pendency of the suit is averred in plaintiff's application for the writ. There is a power in the courts *ex officio* to direct the sequestration of property to protect the rights of the litigants. Code of Practice, Art. 273; Allen, West & Bush vs. Whetstone, 38 An. 849. It is relief, or rather protection, of the same nature as that afforded by the appointment of receivers. In this point of view the condition, we think, authorized the sequestration, and in any aspect, the threatened violation of the right of property entitles the suitor to the preventive remedies prescribed by our law. 38 An. 49; Gridley vs. Connor, 2 An.

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87. We are of opinion the writ properly issued. It is calculated to secure efficacy to the suit to settle the corporate business, that is to adjust the accounts between the co-proprietors and give to each the share of the corporate property to which he may be decreed entitled. This relief our courts are competent to give, and in this case the settlement is not at all difficult. We therefore shall set aside the order to bond, maintain the sequestration with a view to hold the property subject to the orders and decree of the courts in the pending suit. This method it seems to us will secure the right of all and end a controversy between corporators interested only in the division of the remaining corporate property.

It is therefore ordered, adjudged and decreed that the order to bond the property seized under the writ of sequestration be set aside, the writ maintained, and that the property be held subject to the orders and decree of the lower court in the suit to settle the partnership.

No. 12,348.

PEOPLES BANK OF NEW ORLEANS VS. GEORGE P. P. DAVID ET ALS.

This decision affirms that given in *Peoples Bank vs. David et als.*, 49 An., ante, p. 136.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

E. Howard McCaleb for Plaintiff, Appellee.

Charles F. Claiborne and Merrick & Merrick for Tutor of Minors Agnelly, Defendants, Appellants.

Submitted on briefs December 15, 1896.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal by the tutor of the minors Agnelly, from the judgment in this case, the subject of the other appeal, recently decided by us.

For the reasons assigned in that decision, it is now ordered that the judgment appealed from be affirmed.

State vs. Freitas and Clayton.

No. 12,298.

THE STATE OF LOUISIANA vs. J. FREITAS AND THOMAS A. CLAYTON.

49	345
111	118
49	345
117	427

Under the limited jurisdiction of this court in reference to appeals from the courts of city recorders, the question of the guilt or innocence of a party prosecuted under a city ordinance can not be determined on appeal from such a court; but the evidence adduced on the trial in such court may be examined for the purpose of determining the constitutionality or legality of the fine or forfeiture imposed in the ordinance, but not that imposed under it.

A PPEAL from the First Recorder's Court of the City of New Orleans. *Finnegan, J.*

Rogers & Dodds for Defendants, Appellants.

Argued and submitted January 9, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

WATKINS, J. The defendants were arrested on a charge of having violated Sec. 7 of City Ordinance No. 6022, and Ordinance No. 4788, as amended by Ordinance No. 4334; and upon the trial they interposed a motion to quash the affidavits, on the ground that they preferred against them no offence known to or covered by said ordinances.

This motion was submitted upon an agreed statement of facts; and same having been overruled, the Recorder sentenced each of defendants to pay a fine of twenty-five dollars, and, in default of payment, to suffer thirty days' imprisonment in the parish prison, and from that decree they prosecute this appeal.

The following is substantially the statement of facts upon which the case was submitted, viz.:

That Clayton, one of the defendants, was, on the 7th of July, 1896, the general superintendent of the Southern Chemical and Fertilizing Company, Limited, and at that date instructed and directed Freitas, his co-defendant, to dump garbage in the vacant lot indicated in the aforesaid affidavits; and that he did dump the garbage accordingly. That the "garbage so dumped was mixed

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garbage, composed of market sweepings, onions, potatoes, remnants of beefsteaks, and everything that would come from a kitchen and a yard," etc.

"That Ordinance No. 6022, Administration Series, of the city of New Orleans is a valid and subsisting ordinance of said city of New Orleans; that Sec. 7 of said ordinance was in force at the time (of said occurrence); and that said ordinance, together with Ordinance No. 4788, as amended by Ordinance No. 4334, are existing ordinances of the city.

"It is further admitted that, at the date aforesaid, the city had not designated any definite and certain locality to be used for the purpose of dumping garbage."

On this statement there was no question raised and decided in the recorder's court of the unconstitutionality or illegality of either of the ordinances which are drawn in question; and, consequently, there is none involved in this appeal. On the contrary, the distinct admission is that the ordinances in question are valid.

Indeed, the motion to quash, inferentially, at least, admits the legality and validity of the city ordinances by alleging that they preferred against defendants no charge known to or covered by them.

This being the case, the evidence is not, in any event, reviewable on appeal by this court; and, to determine the merits of the motion, an examination of the evidence would be necessary.

In *State vs. Fourcade*, 45 An. 717, this court, after citing and making a careful examination and analysis of authorities bearing on the question, said:

"The questions of fact which the Supreme Court is required, under Art. 81 of the Constitution of 1879, to examine into in respect to the constitutionality or legality of a fine, forfeiture or penalty, are those which are necessary to be investigated for the purpose of determining those questions as to the fine, forfeiture or penalty imposed in an ordinance of a municipal corporation, not those which, if the ordinance be upheld, go to establish the guilt or innocence of the accused *under the ordinance*."

In other words, the guilt or innocence of a party prosecuted under a city ordinance is not examinable by this court on an appeal from the court of a city recorder; but the evidence adduced on the trial in the recorder's court may be examined for the sole purpose of determining the constitutionality or legality of the fine imposed in the ordinance, but not that imposed *under it*.

The question, correctly speaking, is that of the legality of the fine *under the ordinance*, and not its legality *under the facts* adduced at the trial. *State vs. Zurich*, just decided.

In order to remedy such errors or defects as the defendants' motion implies, some process other than an appeal should be resorted to.

We will reserve that right.

Entertaining this view of the legal situation, we feel constrained to dismiss the appeal, and it is so ordered.

No. 12,168.

NEW ENGLAND MORTGAGE SECURITY COMPANY VS. MRS. S. J.
METCALFE ET ALS.

THIRD OPPOSITION OF MISS S. B. METCALFE.

49	347
108	315
109	316

The third opponent claimed a mortgage prior in rank to the mortgage of plaintiff.

She alleged that the appointment of her mother as her tutrix was an absolute nullity, no inventory having been made and recorded before the appointment, and that she (the ward) remained with her rights against the succession, and that her mother was an intermeddler and not a tutrix.

Before the appointment of the mother as tutrix, the uncle of the minor took an affidavit showing the amount due to the latter, and had it recorded.

It was as if an extract of the inventory had been recorded. 35 An. 912.

Article 321 of the Code can well be construed in this case with Art. 304 of the Code.

The court holds: That in no case where the facts are, as in this case, the right of the tutrix can be questioned collaterally. 36 An. 329.

A PPEAL from the Eighth Judicial District Court for the Parish of Concordia. *Philip Hough, J. ad hoc.*

Elam & Dale and Denégre, Blair & Denégre for Plaintiff, Appellant.

John S. Boatner for Third Opponent, Appellee.

Argued and submitted January 18, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

BREAUX, J. This was an action of the plaintiff company to fore-close a mortgage on the Ackland plantation situated in the parish of

Oatahoula. The plantation was owned by Mrs. S. J. Metcalfe. Her two children, R. S. Metcalf and Sallie B. Metcalfe, signed the notes held by plaintiff as makers with the mother, and also signed the act of mortgage as mortgagors. They were not the owners of the property. Miss Sallie B. Metcalfe claimed that she had a mortgage upon the property, but that she did not know that she had a mortgage on the property at the time she signed the notes and executed a mortgage in favor of plaintiff. The mortgagors were all made defendants in the foreclosure proceedings.

Just prior to the sale under the mortgage to plaintiff, Miss Sallie B. Metcalfe enjoined the sheriff from paying the proceeds to the plaintiff company on the ground that her averred mortgage was prior in rank, and in addition, that she was not a debtor as claimed. Her mother, Mrs. S. J. Metcalfe, she alleged, received for her account as a minor the amount she claimed in the petition; that she had not qualified as her tutrix, although she filed an account of what she calls her tutorship in which she acknowledged the amount of her indebtedness.

She alleged that she will oppose the account and seek to hold her mother responsible as an intermeddler. The mother and tutrix was not cited to answer the opposition and has not filed an appearance.

The defendant in the proceedings by third opposition filed an exception of no cause of action and pleaded an estoppel.

The judge of the lower court having recused himself by agreement of all concerned an order was granted transferring the case to be tried before the District Court for the parish of Concordia.

The exception was tried and taken under advisement by the court. The record does not disclose that it was decided.

Subsequently an answer was filed by the mortgage company expressly reserving all rights alleged by it in its exception and denying all the averments of opponent.

Further, the plaintiff company alleging that Mrs. S. J. Metcalfe was the qualified tutrix of Miss Sallie B. Metcalfe pleaded the prescription of four years against opponent's right to set up any claim against her mother on account of her acts of tutorship, and, lastly, alleging that opponent is one of the mortgagors asked that her demand be rejected.

The exception to which we have before referred was, after trial, taken under advisement on the 6th January, 1895. A consent was entered on the minutes to a judgment thereon at chambers.

Security Co. vs. Metcalfe et als.

April subsequent, the court having failed to decide the questions propounded by the exceptors, the plaintiff company filed its answer.

A waiver of the exception, by the answer, was suggested by counsel for appellee in the oral argument at the bar and in his brief.

In view of the fact that the plaintiff in its answer to the third opposition expressly reserved all of its rights, as set forth in the exception, it is difficult to conclude that an exception not dilatory is waived by filing an answer.

The plaintiff answering, having waited a reasonable time for a decision on the exception, could not be held to have waived any of his rights, peremptory in character, by joining issue on the merits, with reservation expressly stated in the answer.

This brings us to the question of the validity *vel non* of the appointment of Mrs. Metcalfe tutrix of her daughter, Miss Sallie B. Metcalfe.

The facts regarding her appointment are, that on the 14th of February, 1878, it was ordered to issue to her, letters of tutorship of her daughter, a minor, on her taking the required oath. She took the oath as tutrix on the — day of February, 1878. Doubtless due to an oversight, the blank space was not filled by inserting the day of the month. Letters of tutorship were issued on the 19th day of February, 1878; subsequent, we have every reason to find, to the day the oath was taken. The letters of tutorship cure the slight irregularity and supply the blank space with the date previously overlooked.

The third opponent, next in order of issues, insists that the appointment of Mrs. Metcalfe was null and void, for the reason that no inventory was made, and that there was, in consequence, no certificate possible based upon an inventory.

As a question of fact, it is true that no inventory was ever made.

The third opponent, however, applied for a continuance, alleging therefor her inability to procure in time for the trial a copy of an affidavit taken by her uncle, and duly recorded on 1st of March, 1878, and reinscribed in 1885, upon which she based her claim of a legal mortgage.

The defendant, in the third opposition, admitted that the affidavit had been made and recorded as alleged, but did not admit the facts as set forth in the affidavit.

In 1879, the tutrix made an affidavit, which was duly recorded,

acknowledging an indebtedness to her minor daughter of forty-four hundred dollars.

As relates to jurisdiction, it must be conceded that the court had authority to make the appointment.

It is well settled when a court has jurisdiction of a case its decrees are conclusive in collateral proceedings. In other words, although the proceedings may have been defective or irregular, such defects can be taken advantage of by appeal, or by action of nullity, otherwise a judgment of a competent court might be overthrown in collateral proceeding upon the ground that the court erred in passing upon the facts.

But the third opponent assumes that the question is jurisdictional. In support of her position she invoked the article of the Civil Code prohibiting the judge from appointing a tutor, before a certificate based upon an inventory has been recorded. The express language of the article reads: "Any appointment or confirmation of such tutor before such recording shall be null and void."

We greatly appreciate the importance of complying strictly with every requisite for the protection of the rights of minors. The inventory, it is true, is a guarantee established by law in the interest particularly of minors and others who are not *sui juris*. It is a matter of public order, good morals even, the object being to prevent the diverting of property from those by whom it is legitimately owned.

But the question before us for determination is not *res nova*. This court has passed upon a similar issue and decided that there may be formalities followed, equal in effect to an inventory and to the tutor's affidavit of record, based upon an inventory.

In the well considered case of Broussard vs Segura, 33 An. 912-915, this court said: "It may be that the father and tutor should have caused an inventory of his son's estate to be taken—that for not so doing he is censurable; but it does not follow that on account of such dereliction his minor son should suffer when the law afforded other adequate remedy which was resorted to."

The effect was given to the affidavit of the tutor and its record in the mortgage office, without an inventory—that is, given to a recorded affidavit based upon an inventory. The court in the cited case expressly holds that the tutor was the agent and that in the absence of any written evidence of mortgage he was authorized to make oath

Murray vs. Kimbro & Allen.

and have it recorded and thus secure the mortgage. Here the maternal uncle acting for the minor, having knowledge of the indebtedness, made the affidavit, and from that date it secured a minor's mortgage. We reiterate the language of that decision to which we adhere in the case here. In the case of Stackhouse vs. Zuntz, 35 An. 529-533, no abstract had been recorded and no affidavit had been made by any one, and yet the court decided that the order appointing the tutor was not void and could not be collaterally attacked, and thereby effect was given to the two articles of the Code, *in pari materia*, viz.: Art. 321 and Art. 364, Civil Code, the latter of which articles among the causes for removal includes the failure of a natural tutor to have an inventory made and abstract recorded in due time; thus clearly denoting that the appointment was not null and void, for in the latter case it would have been idle and futile to have made provision for removal of a tutor absolutely without authority and never appointed. Mrs. Metcalfe, the tutrix, is not a party to the suit. In proceedings not contradictorily with her it would be difficult to conclude that she is not a tutrix in this case. In our view she was a tutrix under a valid appointment; at any rate it must be so held in these proceedings.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the third opposition of Miss Sallie B. Metcalfe be dismissed and the sheriff is ordered to pay the proceeds of the sale in question to plaintiff.

Appellee to pay costs of third opposition in lower court and of appeal in this court.

No. 12,329.

ANSELM B. MURRAY VS. KIMBRO & ALLEN.

A controversy involving the title to nine mules valued at one hundred and forty dollars each is not within our jurisdiction.

The court *ex proprio motu* takes notice of the want of jurisdiction, and dismisses the appeal.

APPPEAL from the Nineteenth Judicial District Court for the Parish of Iberia, *Voorhies, J.*

Foster & Broussard for Plaintiffs in Injunction, Appellants.

State vs. Whitesides.

Walter J. Burke for Defendant, Appellee.

Submitted on briefs January 5, 1897.

Opinion handed down January 18, 1897.

The opinion of the court was delivered by

MILLER, J. This appeal is from the judgment dismissing the third opposition of the appellants claiming the ownership of nine mules seized under plaintiff's judgment for one thousand one hundred dollars against the defendants Kimbro and Allen.

We do not perceive the basis for our appellate jurisdiction. There is no evidence of the value of the mules except that afforded by the sale of a large number, including the nine in controversy. That price was one hundred and forty dollars each. The plaintiff's judgment was for a sum below our jurisdiction; the amount in controversy on the third opposition is manifestly insufficient to give this court jurisdiction.

Although there is no motion to dismiss, we must take notice of the want of jurisdiction of this court, apparent, as we think, on the record.

It is therefore ordered, adjudged and decreed that this appeal be dismissed at appellants' costs.

No. 12,393.

STATE OF LOUISIANA VS. JAMES WHITESIDES.

This court is not required to assign counsel to an accused except on his application showing inability to employ counsel.

The rule is stringent that the defendant, if he does not interrogate the juror as to his qualifications, can not take advantage of the disqualifications of the juror after verdict.

If the juror swears falsely on his *voir dire* and the fact is discovered after verdict, the disqualification may be urged as ground for a new trial. The fact of disqualification must be shown by other testimony than that of the juror.

In the refusal to grant a new trial, and in the discipline of the court in allowing time to file motions and to hear arguments, in all matters referred to his sound discretion, the Supreme Court will not disturb the rulings of the District Judge, unless they are arbitrary and manifestly inflict a wrong upon the accused.

A PPEAL from the Twenty-first Judicial District Court for the Parish of Jefferson. *Rost, J.*

49	852
110	11
110	12

M. J. Cunningham, Attorney General, and *Robert J. Perkins*, District Attorney, for Plaintiff, Appellee.

William L. Thompson and *Thomas F. Maher*, for Defendant, Appellant.

Argued and submitted January 28, 1897.

Opinion handed down February 1, 1897.

Rehearing refused March 1, 1897.

The opinion of the court was delivered by

MCENERY, J. The defendant by information was charged with an attempt to commit the crime of arson. He was convicted and sentenced to hard labor for five years. He made application for the assignment of counsel, but managed his own case, challenged jurors, examined witnesses and made an argument in his own behalf before the jury. The record shows no error in the trial of the case.

After his conviction the accused employed counsel to take charge of his case. His counsel presented the following motion for a new trial, which the judge could, on its face, have instantly overruled with propriety:

"On motion of William L. Thompson, attorney, and Thos. F. Maher, of counsel for the accused, and upon suggesting to this Honorable Court that the conviction and jury verdict of guilty as rendered against the accused in the above entitled and numbered cause is contrary to the law and the evidence, and that the trial of the case was conducted with grave irregularity, which prevented him from getting the benefit of substantial justice.

"That the verdict is contrary to the law in this, to-wit: That the jury did not give the proper consideration to the charge of the court as to the weight, application and effect of circumstantial evidence, and the legal construction and difference between circumstantial and positive evidence.

"That the jury disregarded and did not intelligently understand the charge of the court as to what is known in the law as the reasonable doubt, and that the jury did not follow the instructions of the court, and give to the accused the benefit of the reasonable doubt.

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"That the composition of the jury which found the accused guilty was not the character of jurors having the capacity to serve as grand and petit jurors as provided by Art. 116 of the Constitution of this State and the jury laws passed in conformity therewith, and it was only after the trial and verdict that he made this discovery, and that he could not have made this discovery before or during the examination of the tales jurors, while being examined upon their *voir dire*, by the exercise of due diligence, as he was not represented by counsel before, at or during his trial.

"That a majority of the jurors impaneled and sworn to try the accused, and did try the accused, expressed a pronounced opinion as to the guilt of the accused previous to their being selected to try him, and being unrepresented by counsel before and at the time the jury was being impaneled and sworn he could not interpose the proper legal objection to the jurors while on their *voir dire*, and he did not waive any of his legal right to a fair and impartial trial, as this state of facts could not have been discovered by the accused by the use of due diligence and was only discovered since his trial and conviction.

"That the Constitution of this State gives the accused the right to have the assistance of counsel to defend him, and the laws of this State provide and make it the duty of the court to appoint counsel to defend him.

"That the accused was charged with the commission of a felony, and under the laws of this State it was made the duty of the court to appoint counsel learned in the law, to represent him so as to secure his legal as well as constitutional rights guaranteed to him by the Constitution and laws of this State, and that the accused was not represented by counsel.

"That the accused was unable to employ counsel learned in the law at the trial of this case, and owing to his inability to employ counsel and being unrepresented by counsel he was not allowed to make his full defence.

"That since the trial of the case the accused has discovered evidence which he could not produce at the former trial of the case by the exercise of any degree of diligence on his part. That the newly discovered evidence is material, and not merely collateral, or cumulative, or corroborative or impeaching, and the said evidence will produce a different result on the merits on another

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trial. That the said newly discovered evidence will go to the merits and not rest on merely a technical defence.

"That the court erred in permitting the District Attorney to comment on other charges of arson charged against this defendant. That said argument appealed to the passions and prejudices of the jury, and was illegal, and should have been so charged by the court.

"That the court erred in allowing testimony of two bottles of coal oil to go to the jury as evidence, without first connecting defendant with said coal oil, and some attempt to use the same on a dwelling house.

"That the evidence was not responsive to the charge of attempting to set fire to a dwelling house in the parish of Jefferson.

"That in character the newly discovered evidence will prove that the police authorities of this parish on the night of the arrest of the accused, and at the time of the offence, and at the place where the alleged attempt at arson was committed, made a careful investigation, and were unable to find any evidence after several hours' search, in and about the premises, that could or would connect the accused with the commission of such an offence, and that it was only the next day, or many hours after the complainant caused the arrest of the accused, that two bottles containing coal oil were found upon the adjoining unoccupied house, which was open at all hours of the day and night to the public; that the bottles containing the oil were found, and it was only after the brother of the accused had asserted that the complainant, or the party who claimed that an attempt was made to set fire to his house, would be held responsible for the false accusation made against his brother, the accused, that the bottles containing the coal oil were found, and it was owing to this character of circumstantial evidence, and the only evidence that caused the conviction."

There was no obligation on the court to appoint counsel for the accused unless he applied for the same, alleging his inability to employ counsel.

Having undertaken his own case, he must ~~abide~~ abide the consequences. It is certainly no reason for reopening the case that he had failed to avail himself of the privilege of having counsel assigned him.

It will be noticed that the greater part of the motion relates to matters which should have been urged in the course of the trial, and can not be urged as grounds for a new trial. This extends even

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to that part of the motion in relation to the charge that the jury which tried the accused did not have the qualifications required by law. The rule is stringent that the defendant, if he does not interrogate as to the qualifications of the juror, can not take advantage of the want of the necessary qualification after verdict. *State vs. Bird*, 38 An. 497; *State vs. Bower*, 26 An. 383; *State vs. Kennedy*, 8 Rob. 590; *State vs. Nolan*, 13 An. 276; *State vs. McLean & Hamilton*, 21 An. 546.

If the juror answers falsely and this fact is afterward ascertained for the first time after verdict, this disqualification may be urged as grounds for a new trial. The fact of incompetency must be shown by other testimony than that of the juror. *State vs. Nash and Barnett*, 45 An. 1187.

Complaint is made of the refusal of the trial judge to issue compulsory process for the witnesses, the jurors, and one Martin to prove what is alleged as newly discovered evidence. There is no averment or statement as to any fact which the witnesses were expected to prove. The motion seems to have been formed for the purpose of searching for evidence. Certainly, if any fact had come to the knowledge of the accused after verdict, he could have alleged it. We do not think the judge was called upon to make the court the means of searching for facts which would serve the accused in his efforts for a new trial. But if it were a fact that some of the jurors were not qualified, this could not be urged for a new trial, as it is not shown that the person was interrogated on his *voir dire* as to his qualification and swore falsely. Same authorities quoted above.

The motion was tried, and there were a number of bills of exception reserved to the ruling of the court.

Several of the bills relate to the refusal of the judge to summon the twelve jurors who tried the case. We have passed upon this point.

The accused was not entitled to compulsory process for obtaining witnesses in his favor in support of a motion for a new trial. *State vs. Gauthreaux et al.*, 38 An. 608.

Evidence was offered on the motion for a new trial to prove that the District Attorney in his argument referred to other attempts and trials therefor, for arson alleged to have been committed by the accused. There was no objection urged to the argument on the trial and no ruling of the judge required thereon. The District

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Attorney, however, in his testimony fully explains the reason for his argument, being called for by the testimony of the accused in his own behalf.

There were many objections and rulings thereon in the course of the trial of the motion. It is unnecessary to notice them. No part of the evidence sought to be introduced could have been of benefit to the accused, and the legal principles involved are not such as to serve any useful purpose. A great deal of the testimony was an effort to retry the case, or to show the weakness or unreliability of testimony on the trial.

The accused applied for additional time to prepare a motion in arrest of judgment. The application was made on the last day of the term. This was refused. Counsel then asked for half an hour in which to prepare the motion. This was granted, but without the privilege to argue it. Counsel for accused declined to accept this ruling. We are not informed on what ground the motion would be urged. It is not shown that the accused has, in any way, been prejudiced by the ruling of the trial judge.

In the refusal to grant a new trial, and in the discipline of the court, in allowing time to file motions and to hear arguments in all matters referred to his sound discretion, we will not disturb his rulings, unless they are arbitrary and manifestly inflict or do a wrong to the defendant. This is the uniform jurisprudence of the State.

Judgment affirmed.

No. 12,364.

W. H. BRISTOL vs. A. J. MURFF.

Property described in the assessment roll, as it is described in a partition and is on record, is sufficient to identify the property.

When property is constructively seized by the tax collector, when it is under seizure by attachment in a Federal Court, and the attachment is dissolved, the tax collector's seizure will hold good.

When property can be conveniently offered in less quantity than the entire tract, the tax collector must comply in offering it for sale with Art. 210 of the Constitution.

APPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

49	357
50	999
49	357
107	354
107	596
1107	598

T. F. Bell for Plaintiff, Appellant.

Bristol vs. Murff.

A. H. Leonard for Defendant, Appellee.

Argued and submitted January 20, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

MCENERY, J. This is a suit to annul a tax sale. The tax collector of Bossier parish sold for the delinquent taxes of 1891 property of the plaintiff, described on the assessment rolls as "one-fourth interest in Succession of B. F. Hollingsworth. Lot 3 of partition of seven hundred and ninety acres, in Township 18, R. 13, valued at two thousand seven hundred and fifty dollars." The taxes due were fifty-eight dollars and eighty cents. Prior to the sale the property had been seized under writs of attachment from the Federal Court.

The grounds for the annulment of the tax sale are insufficiency of the description of the property on the assessment rolls, its prior seizure by the United States Marshal under the writ of attachment, and the non-compliance with Art. 210 of the Constitution of the State.

The description was sufficient to identify the property. The seven hundred and ninety acres in the succession of Hollingsworth had been partitioned, and Lot 3 was the part or portion belonging to plaintiff. The partition proceedings were matter of record, and Lot 3 distinctly ascertained to be the property of plaintiff.

The attachment was dissolved in the Federal Court. This made the prior seizure by the tax collector constructively, while the property was in the custody of the marshal, a binding and legal seizure.

The failure of the tax collector to comply with Art. 210 of the Constitution is more serious than the other reasons alleged for the nullity of the sale.

The tax deed is *prima facie* evidence of a valid sale. Its recitals, however, are not conclusive, but may be contradicted as to the essentials required for a valid tax sale. One of these essentials is that the tax collector "shall sell the least quantity of property which any bidder will buy for the amount of the interest, taxes and costs. In the tax deed there is no recital that Art. 210 of the Constitution had been complied with. On the contrary, it recites that

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"he proceeded to offer said described property for sale for cash without appraisalment." The lot contained 197½ acres. It was easy of subdivision and could have been offered at less quantity than the whole tract.

In case of *Norres vs. Hays*, 44 An. 912, in which the tax deed was annulled, we said that "the tax deed also shows that said article of the Constitution was violated in the sale of the property in block."

Also case of *Land and Improvement Company vs. Succession of Fasnacht*, 47 An. 1294.

Whenever the property can be conveniently offered in less quantity than the entire tract, the compliance with the article of the Constitution is imperative. In municipalities, when the lots have a designated size, it is impractical to offer less than the minimum size of the lot prescribed by municipal ordinances. As held in the last case referred to, when there are several lots or parcels of ground within municipal limits held by different titles, it is error on the part of the tax collector to offer all the properties at one time for the tax due. The plot accompanying the record shows that the tax collector could have offered less quantity of the property than he did for the amount of taxes due. The defendant asks, in case of the sale being annulled, to be reimbursed for all taxes paid by him and the price of the adjudication. Article 210 provides: "No sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with 10 per cent. interest, be tendered to the purchaser."

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the tax deed set up by defendant as title, and the tax sale under which defendant purchased be annulled, on the condition that the plaintiff shall pay to the defendant the price of the adjudication to him of the property, with ten per cent. interest thereon and the amount of taxes paid by defendant since he acquired possession of said property. The defendant to retain possession of said property until the above amounts are paid, when he shall make restitution of said property to plaintiff; defendant to pay costs.

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No. 12,302.

LOUIS T. MICHENOR ET ALS., TRUSTEES OF THE LAND TRUST OF
INDIANAPOLIS, INDIANA, VS. JACOB A. REINACH.

ON MOTION TO DISMISS.

The appeal bond is given for the sum ordered by the judge; the appeal is devolutive, although the bond is not for one-half over and above the judgment appealed from.

In a suit to compel the acceptance of title to property adjudicated to defendant it is not required that plaintiff shall set out his whole chain of title in the petition. The character of the title tendered is a matter of proof.

Where several distinct adjudications have been made at the same sale the plaintiff can cumulate the demand for specific performance of adjudications.

There is no law in this State which forbids an association of individuals from holding property in common for their mutual benefit, and such association can confer power upon some of its individual members to hold title for purpose of sale.

ON THE MERITS.

In Indiana when such an association exists and it has transferred title to trustees for certain purposes, the death of one of the parties will not affect the transfer. The equitable title so transferred will survive in the surviving member of the trust. Hence when such an association has created trustees to sell and dispose of its property, the death of one of them will not abate the suit instituted in this State by them. It is not, therefore, required that the sale of the property entrusted to said trustees should be in accordance with the laws of this State for the sale of property under administration.

A party is not compelled to accept title which threatens litigation.

In this case the peculiar circumstances accompanying it and the facts bring it within the ruling of *Billgery vs. Land Trust*, 48 An. 890, and on the authority of that case the judgment is affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

E. Howard McCaleb for Plaintiffs, Appellees.

Benjamin Ory for Defendant, Appellant.

William Winans Wall for John Watt, Intervenor, Appellee.

ON MOTION TO DISMISS.

Submitted on briefs November 18, 1896.

Opinion handed down November 30, 1896.

Michenor et als., Trustees, vs. Reinach.

ON THE MERITS.

Argued and submitted February 3, 1897.

Opinion handed down February 15, 1897.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

BREAUX, J. The motion has been made to dismiss this appeal on the ground that the bond furnished by the appellant is in amount insufficient for a suspensive appeal; it not being for one-half over and above the amount of the judgment appealed from.

Under the rules governing appeals the motion, as stated, presents the only ground for decision in this case.

It is true that the amount of the bond is less than is required by law for a suspensive appeal.

The amount of the bond is that fixed by the judge *a quo*.

While it is not sufficient for a suspensive appeal, it is sufficient for a devolutive appeal.

This was the decision, upon this point, in a number of cases before this court. Succession of Keller, 89 An. 580, and authorities cited.

The present appeal should be sustained in so far as it is devolutive.

To that extent the motion to dismiss the appeal is denied.

ON THE MERITS.

MCENERY, J. This suit was instituted to compel defendant to accept title to property adjudicated to him at auction sale.

The defendant excepted to the suit (1) because the plaintiffs have not stated in their petition the nature and derivation of the title under which they claim the ownership of the property, and that the petition is vague and indefinite; (2) because plaintiffs claim to be the trustees or agents of a corporation named the "Land Trust of Indianapolis," and neither their agency nor the domicile of said corporation is mentioned in said petition; (3) because plaintiffs have cumulated in one action sundry separate and distinct contracts based upon separate adjudications of distinct properties.

The petition states that plaintiffs are owners of the property described in the petition and that the same was adjudicated to defendant. This is sufficient. It was not necessary that the plaintiffs should set out the chain of title to the property. It was a matter of

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proof on the trial for plaintiffs to exhibit to defendant the title which they proposed to give to the property.

The petition alleges that the plaintiffs are the trustees of the "Land Trust of Indianapolis, Indiana," and that they reside in said city. The capacity of plaintiff to sue is accurately set forth. If said corporation has no existence, and was not properly represented by the trustees, it was a matter of proof.

The character of plaintiffs' suit in cumulated demands is in accordance with the text of Art. 148, Code of Practice.

A second exception was filed of no cause of action; that plaintiffs pretended to act as agents and attorneys in fact of an unauthorized corporation, and failed to annex to their petition the power of attorney under which they acted; that plaintiffs can not appear in court except in their individual names. Much of this exception was contained in the first one filed.

It is not essential to go into the history of the organization of the said trust company of Indianapolis. The defendant is not interested therein. It was either a valid and legal corporation, a *de facto* corporation, or an association of individuals for certain purposes. Those who authorized it to act are bound by its acts and third parties are protected. This association conveyed to plaintiffs its rights in and to the property in controversy. All parties, members of said Trust Company, are bound by this deed, as they authorized it. The plaintiffs, whether as agents or attorneys in fact for the Trust Company, or as *bona fide* purchasers under said deed, had the power to sell said property, and the purchaser at such sale being an innocent third party, would be undoubtedly protected in his purchase. There is no law in Louisiana which prevents an association of individuals from acquiring property and holding it in common for their mutual benefit. And there is no law which prevents them from selling the same. In this case all individual interests were represented in the power to acquire and to dispose of the property.

The Western Land and Immigration Company, which sold to the plaintiffs, is an incorporated company, as appears by the certificate of the Secretary of State of Indiana.

We understand that the plaintiffs had a conveyance from the Trust Company for the purpose of selling the land in controversy, and that they were the agents or trustees of said company or association of individuals for that purpose. The capacity in which they sell is amply set forth in the petition.

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In reference to the interest of W. W. Smith, a member of the Land Trust Company, whose estate is now under administration in the State of Indiana, it appears that in his lifetime, as a member of said company or association, he transferred with the other members of said association whatever interest he had to the present plaintiffs.

This deed investing the trustees with a legal estate survived, and could be executed by the survivors under the laws of Indiana. *Peter vs. Beverly*, 10 Peters, 582; *Grisar vs. McDowell*, 6 Wallace, 377.

The exceptions were overruled. The defendant answered, denying that the auctioneer had authority to sell said properties from the proper authorities, and he affirms that the titles offered by plaintiffs are illegal.

(1) The property described as square No. 187, in the Seventh District, stands on the records in the name of Joe Walton; (2) all the property described in plaintiff's petition is alleged to be owned by John Holliday, Francis T. Holliday, James N. Houston, J. Augustus Lemeke, Julius F. Pratt, Charles Bradford, Henry E. Drew, Henry Jameson, William B. Heard, Louis T. Michener, William J. Richards and the estate of William W. Smith in Indiana, and the sale of said property can not be made in the manner adopted by plaintiffs; that said property was never adjudicated to the Western Land and Immigration Company, of Indianapolis, the author of plaintiffs' title, at tax sale; that the Western Land and Immigration Company never had any corporate existence, and even if it had Henry E. Drew and William W. Smith, who claimed to be president and secretary respectively of said company, acted without authority; that the tax sale on which the title is based was defective in the fourth and fifth described properties for the years 1876, 1877, 1878, as the property was not properly assessed, being in the name of Miss B. A. Clarke; that the sixth, seventh, twelfth and thirteenth described pieces of property for the taxes of 1876, 1877 and 1878 were also improperly described on the tax rolls, being assessed to Mrs. M. G. Knorr; that the eighth and ninth pieces of property were erroneously assessed for the same year to Eliza B. Walker; that the tenth piece of property for the same year was improperly assessed to H. Lahen, and the eleventh for the same year erroneously assessed to Mr. Druhan; that the Western Land and Immigration Company claiming to have acquired the first, second and third pieces of property through D.

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Negrotto, who purchased at tax sale, had no title to said property, as Negrotto's title was null and void, because for the years for which it was assessed it was on the rolls in the name of Edmond L'Hoste. There are other defective assessments as to the second and third pieces of property for the year 1878, being in the name of E. A. Collins. It is urged in the answer that none of the parties to whom the assessments were made were ever notified of same; that neither plaintiffs nor the author of their titles have complied with the terms and conditions of the tax sales, and paid the taxes assumed by them on said property; that Eliza A. Collins is dead, that her succession has been opened, and that certain persons named in the petition have been recognized as her sole heirs; that Eliza B. Walker is dead, and that Mrs. Kate Walker has been recognized as her heir; that Martin Druhan is dead, and that his widow has been recognized as surviving widow in community; that all of said parties claim adversely to plaintiffs' title. He prays that all of these parties be cited and be made parties to the suit. The order was granted as prayed for. It does not appear that the citations were served on the parties.

Plaintiffs claim title as follows: Adjudications by the State Tax Collector, under Act 82 of 1894, to the Western Land and Immigration Company, and by purchase direct from the Auditor and from D. Negrotto, who purchased at tax sales, by said company which sold to the trust company, and who sold to the present plaintiffs, who are to all intents and purposes, according to the law of Indiana, vested with the legal estate. Revised Statutes of Indiana, Secs. 2985, 2977.

In the attack on plaintiffs' title, defendant offered in evidence the records in the succession of Druhan, and the record of the suit of Eliza A. Druhan vs. L. T. Michener *et als.*; the record in the succession of E. A. Collins and the record in the suit of Lloyd Posey vs. L. T. Michener, and the record in the succession of Mrs. Eliza B. Walker, and the record in the succession of B. L'Hoste, and the petition in the intervention of John Watt claiming ownership of Square 187.

No evidence was introduced to impeach the validity of the tax sales other than to show that the property in the above successions was in litigation between the interested parties in said succession and the plaintiffs herein.

So far as these suits and the succession records show that the property claimed therein is in litigation and the title uncertain,

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the defendant can not be compelled to accept title from the plaintiffs.

The decree of the lower court was in accordance with the recognized principle in our jurisprudence that the defendant can not be compelled to accept a title that carries with it a threatened litigation, or disturbance.

The decree, therefore, recited that the defendant should comply with his bid for all properties adjudicated to him where there was no clouded title, and released him from his bid on properties adjudicated to him where the ownership of the same was claimed by other parties and involved in litigation, and as to the demand for the specific performance of the adjudication for these properties, he entered a judgment of *non-suit*.

Act No. 82 of 1884, Sec. 5, provides that the purchaser under said act shall assume all unpaid taxes subsequent to 1879. They are not prescriptible under ten years, if at all.

The purchaser is bound to pay them, and the tax collector should demand and receive the payment of the same before making title to the property. *State ex rel. Martinez vs. Tax Collectors*, 42 An. 677; *Remick vs. Lang*, 47 An. 914.

But on the authority of *Billgery et als. vs. Land Trust Company of Indianapolis*, 48 An. 890, we conclude that all the taxes on this property were canceled by a decree of the Federal Court in 1888, in the case of the Western Land and Immigration Company vs. George Guinault *et als.*, No. 11,764, United States Circuit Court, Eastern District of Louisiana. The reasons for the decree, and taking that case outside of the ruling of the cases referred to in the 42d and 47th Annuals, are fully stated in the opinion in the Billgery case. The decree in the Federal Court had been rendered before the decision in the case of *State ex rel. Martinez*, 42 An. 677.

John Watt intervened in the suit, resisting the demands of plaintiff and setting up title to square 187. He redeemed the property for the unpaid taxes assumed by the Western Immigration Company in 1894. The facts in his case are identical with those of the Billgery case, 48 An. 890. Under the ruling in that case we can afford him no relief.

Judgment affirmed.

State vs. Itzcovitch.

No. 12,259.

STATE OF LOUISIANA VS. JACOB ITZCOVITCH.

Ordinance of the City of New Orleans No. 12,619, regulating pawnshops and second-hand stores, amending its Ordinance No. 12,512, is null and void. No legislative authority vested the City Council with power to enact said ordinance. It is not within any of the police powers necessary for the administration of the municipality.

A PPEAL from the First Recorder's Court of the city of New Orleans. *Finnegan, J.*

James J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for City of New Orleans, Plaintiff, Appellee.

Albert D. Henriques for Defendant, Appellant.

Argued and submitted February 5, 1897.

Opinion handed down February 15, 1897.

The opinion of the court was delivered by

McENERY, J. The City Council of New Orleans enacted the following ordinance:

“ MAYORALTY OF NEW ORLEANS, }
CITY HALL, September 8, 1896. }

(No. 12,619, Council Series.)

“ An Ordinance amending Ordinance No. 12,512, Council Series.

“ *Be it ordained by the Common Council of the City of New Orleans*, That Ordinance No. 12,512, Council Series, be and the same is hereby amended so as to read as follows:

“ SECTION 1. *Be it ordained*, That from and after the passage of this ordinance, it shall be the duty of every person keeping a shop or other place, whether as owner or agent, where second-hand goods are bought, sold or exchanged, to furnish to the superintendent of police, at his office, between the hours of 3 o'clock P. M. every day in the year, a complete descriptive list of all articles bought, sold or exchanged, at such shop or place, during the twenty-four hours last preceding, and since the furnishing of the last report, together with the name, sex, color, apparent age, and general description and

place of residence of the person or persons buying, selling or exchanging each of said articles; provided, that all dealers in goods of any kind or description, which shall have been used, or which shall have been transferred from the manufacturers to the dealer, and then received in the possession of third persons, whether the same consists of clothes, bicycles, or other vehicles, carpets, clothing, firearms, weapons, household utensils, or of articles of personal use, or of male or female wearing apparel, or of jewelry, gold or silver, shall be and are hereby declared to be second-hand dealers; provided, further, that second-hand furniture dealers, paying licenses as such, and who buy and sell furniture exclusively, either at auction or private residences, shall not be considered second-hand dealers within the meaning of this ordinance.

"SEC. 2. *Be it further ordained*, That whoever loans money on deposit or pledges of personal property, or who purchases personal property, or choses in action, on condition of selling the same back again at a stipulated price, is hereby defined and declared to be a pawnbroker."

"SEC. 3. *Be it further ordained*, That all keepers, whether as owners or agents, of shops or places commonly known as loan offices or pawnbroker shops, and all persons who habitually lend money on pawn or pledge of diamonds, jewelry, plate, valuables, clothing, firearms, or other movables or personal property, shall at the time of receiving any article of property whatsoever in pawn or pledge, enter in a book to be kept by them, respectively, a full and complete description of the articles of property so pawned or pledged, with the date and hour of receiving the same, and the name, description and place of residence of the depositor or pledgor, and shall, on demand of the Superintendent of Police, or of any officer or person acting under his authority, exhibit to him, with the articles of property therein mentioned, the books of the description so required. It shall also be the duty of such keeper to make daily reports in the same manner required in the preceding section, save that the name and place of residence of the pledger may be omitted therefrom. The reports herein provided for in this section shall be considered as confidential, and shall be for the private use of the police solely.

"SEC. 4. *Be it further ordained*, That the shops and places mentioned in Secs. 1 and 2 hereof shall be kept closed from the hour

of 10 o'clock P. M. to 6 o'clock A. M., except on Saturdays, when the hours of closing may be extended to 11:30 P. M.

"SEC. 5. *Be it further ordained*, That in the event that any day shall be a legal holiday, then the said report required by Secs. 1 and 2 shall be made on the day following and between the hours aforementioned.

"SEC. 6. *Be it further ordained*, That the proper blanks for the reports aforementioned shall be furnished at the office of the Superintendent of Police on application.

"SEC. 7. *Be it further ordained*, That it shall be unlawful for the owner or keeper of a shop described in Sec. 1 to sell, exchange, barter or remove from their place of business, or permit to be redeemed, any of the goods bought, exchanged, pledged, pawned or deposited by, to, or with them for the period of seven days after the making of the report thereof provided for in this ordinance.

"SEC. 8. *Be it further ordained*, That it shall be unlawful for any owner or owners, keeper or keepers, agent or agents or parties representing said owner or owners or proprietors of any second-hand store, pawn shop, or loan office to buy, pawn, pledge or exchange any article or articles from any minor under the age of sixteen years, from a person appearing to be intoxicated, from a person known to be a notorious thief, or from a person known to have been convicted of larceny or burglary.

"SEC. 9. *Be it further ordained*, That in the event any person or persons shall tender for sale, pawn or exchange any article or articles to the owner or owners, keeper or keepers, agent or agents, or parties representing said owner or owners or proprietors or keepers of any second-hand store, pawn shop, or loan office, and they having good reasons to believe that such article or articles were stolen, it shall be their duty to have the person or persons so tendering the same immediately arrested.

"SEC. 10. *Be it further ordained*, That any violation of this ordinance shall be deemed a misdemeanor, and any person or persons violating any of the provisions of this ordinance shall be liable to a fine not exceeding twenty-five dollars or imprisonment in the parish prison not exceeding thirty days, at the discretion of the recorder of the district in which the offence shall have been committed."

(Other sections omitted.)

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The defendant, who keeps a second-hand store in the city of New Orleans, was arrested and convicted for violating provisions of the above ordinance. He contested its legality and constitutionality in the recorder's court. He specifically avers that the City Council was without authority or power to enact said ordinance.

The regulation of such establishments as are named in the ordinance is, undoubtedly, an exercise of police power, but they are of that character that the City Council of New Orleans is without power to police them in the manner adopted in the ordinance without special legislative permission.

We presume there was a necessity for the attempt to regulate the establishments mentioned and provided for in the ordinance, but however great the necessity, without the sanction of legislative authority the City Council was without power to enact such an ordinance. Under the grant of police power to the city no such power is vested in the City Council. Hence its exercise was unlawful. 1 Dillon on Municipal Corporations, par. 317; Secs. 14, 15, City Charter.

In the case of *State vs. Robertson*, 45 An. 954, this court held that an ordinance of the City Council of New Orleans providing for the office of inspector and examiner with the power to examine engineers, and to grant certificates of competency and to inspect boilers, etc., was illegal, as the power to enact such an ordinance was not granted to the city and could not be inferred from the powers granted.

In *State vs. Von Sachs*, 45 An. 1416, it was held the City Council of New Orleans had no power to enact an ordinance requiring labor agents to give bond for a faithful discharge of duties as labor agents.

The language employed in that case is applicable here. "The City Council can exercise only such power as legislative authority confers upon it. It can prohibit no business authorized by the Legislature and when it assumes that the Legislature authorizes the taxation of the occupation * * * it can not, in authorizing the business or occupation to be carried on, impose obligations not authorized by the Legislature."

The occupations attempted to be regulated are legitimate occupations licensed by the State, and the city can impose no burden upon the carrying on of these occupations not authorized by the Legislature.

In the *City of Clinton vs. George W. Phillips*, 58 Ill. 102, there was

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an effort made by the plaintiff city to regulate the sale of intoxicating liquors for medicinal, mechanical and chemical purposes, requiring a report quarterly of the kind and quantity sold for such purposes, when and to whom sold and on whose prescription. The ordinance was held to be illegal, because there was no power to enact it.

In *Long vs. Taxing District*, 7 (Lea) Tenn. Reports, it was held "a municipal corporation can not, without special legislative authority, pass an ordinance requiring merchants, parts of whose business is the buying and repacking of loose cotton, in addition to the other conditions prescribed by law and ordinance for taking out merchant's license, to give bond to keep in a book specially provided for the purpose a daily record of the name of each seller of loose cotton and the quantity of each purchase, and that he will keep such book at all times open to the inspection of the police."

The ordinance was enacted to break up the stealing of loose cotton. The court said: "The ordinance does not regulate the administration of the local government, the convenient transaction of business or the conduct of the citizens with a view to health and comfort, nor is it such as can be said to fall within the general duties of municipal bodies. It is rather intended to facilitate the enforcement of the criminal law against theft of loose cotton."

And the ordinance under review was evidently intended to facilitate the enforcement of criminal law in the detection of thefts of personal property. The ordinance, no doubt, has accomplished good results, but there was no authority to enact it. Legislative grant of power to enact such an ordinance must be obtained before it can have any effectual force.

That part of the ordinance which makes the violation of any of its provisions a misdemeanor is illegal, in that it makes or creates an act a crime which the Legislature has not seen fit to do. *State vs. John McNally*, 48 An. 1450.

The ordinance above recited, No. 12,619, council series, is declared to be null and void, and the judgment appealed from is annulled and reversed, and it is ordered that the defendant be discharged.

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No. 12,424.

STATE OF LOUISIANA VS. ANTOUR HOLLIER.

49	371
52	118
49	371
118	663

1. It is not sufficient ground to authorize the continuance of a cause that a material witness is absent on the day set for the trial, if the statement in the defendant's affidavit discloses that the testimony of such witness would be open to the objection of inadmissibility as hearsay.
2. Surprise at the statement of a witness is not ground for a new trial, in case the trial judge informs the party surprised that he may introduce any other witness or evidence he may have for the purpose of supplying the ellipsis of proof, notwithstanding it may tend to contradict the statement of the witness giving the surprise, and such party has failed to avail himself of the opportunity.
3. An application for a new trial, predicated upon newly discovered testimony, will not be regarded as having been improperly refused in case the proposed testimony is cumulative or corroborative, and the affidavit is not sworn to by the witnesses upon whom the affiant relies.

A PPEAL from the Nineteenth Judicial District Court for the Parish of St. Martin. *Voorhies, J.*

M. J. Cunningham, Attorney General, *James Simon*, District Attorney (*R. F. Broussard* and *P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

James E. Mouton for Defendant, Appellant.

Submitted on briefs March 6, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

WATKINS, J. Having been indicted for the perpetration of the crime of abduction, and tried, convicted and sentenced to imprisonment in the State penitentiary at hard labor for a term of three years, the defendant prosecutes this appeal, relying on one bill of exceptions which was reserved to the refusal of the trial judge to grant him a continuance; another to his refusal to grant him a new trial; and another to his declination to arrest the judgment.

This prosecution is grounded upon Sec. 1 of Act 134 of 1890, making the abduction of women a crime, which is of the following tenor, namely:

"That any person who shall fraudulently, deceitfully, or by any

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false representation, entice, abduct, induce, decoy, hire, engage, employ or take any woman of previous chaste character, from her father's house, or from any other place where she may be, for the purpose of prostitution, or for any unlawful sexual intercourse, at a house of ill fame, or at any other place of like character, or elsewhere * * * shall on conviction be punished by imprisonment at hard labor in the penitentiary for not more than five years."

This quotation from the legislative act will serve to illustrate the character of the prosecution and of the proceedings, the correctness of which are drawn in question and presented to us for decision.

I.

The cause having been set for trial, defendant's counsel objected to proceeding therewith at the time fixed, on the ground that one of his principal witnesses, Pierre N. Thibodeaux, though duly ordered summoned, had not been served and was not present, and that he could not safely go to trial without the benefit of his testimony.

In support of his application the defendant made affidavit, amongst other things, to the substance and purport of the testimony the absent witness would give, and which statement was, in substance, as follows, viz.:

That previous to anything being said or done which tended, in any way to connect the defendant with the abduction of the prosecutrix, Maude Gallagher, her mother visited the house of said witness, Thibodeaux, and told him, in an angry and threatening manner, that her daughter "had assured her that she, Maud Gallagher, had been seduced and abducted by him (Thibodeaux) and was with child by him, and that she (the mother) had come to tell him that she (the daughter) would force him (Thibodeaux) to marry the said Maud, her daughter;" and many other statements of like character.

That neither in that interview, nor at any other time, was anything said or intimated, to the effect that the defendant was connected with the abduction of the prosecutrix, in any way.

The purpose and object of this proffered statement was, to show that the prosecutrix, Maud Gallagher, was not "a woman of previous chaste character," which is the *sine qua non* of the statute; for the reason that she was, herself, in doubt as to the paternity of her child—her mother, at her suggestion, having charged the witness (Thibodeaux) to have been its illegitimate father.

The judge declined to grant the requested continuance, because of the alleged declaration to the witness (Thibodeaux) having been made by the mother of the prosecutrix as having been requested by the latter, it was hearsay, and would be inadmissible as evidence on the trial.

This ruling was manifestly correct. The mother might have been placed upon the stand, under certain circumstances, to make proof of the facts detailed; and, if the prosecutrix had made such a statement to the witness (Thibodeaux), it might have been received as part of the *res gestæ*. But, taking the statement as it occurs in the defendant's affidavit, it would have been open on the trial to the objection that it was hearsay.

II.

The motion for new trial is based upon the grounds following, viz.: (1) That his application for a continuance was incorrectly refused, and he was unseasonably and hurriedly forced into trial without his most important witness; (2) that during the progress of the trial he placed upon the stand a person by whom he expected to prove that the prosecutrix had, repeatedly, sent messages to the defendant proposing appointments or assignations at certain designated places, but that very much to his surprise and disappointment, the said witness when interrogated professed to have no recollection thereof; that the anticipated statement of said witness was perfectly true and in conformity with the facts as they actually existed, and in his opinion and belief said witness was intimidated by friends of the prosecutrix and prevented from making the disclosures expected; (3) that since the trial and verdict defendant has discovered new, important and material testimony "whereby he can and will prove that long previous to his alleged false promise or representations to Maud Gallagher, and previous to her alleged abduction by him, she was not of chaste character," giving full particulars of frequent unlawful sexual intercourse between the prosecutrix and other men.

In the course of the reasons assigned by the trial judge he reiterated, in reply to the *first* ground of complaint, the statement he made in the first bill of exceptions, that the testimony of the absent witness, Thibodeaux, would have been objectionable as hearsay; to the *second* he said that, conceding defendant's surprise at the statement

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of the witness referred to, he informed counsel that he was at liberty to introduce any other witness or testimony he had upon the same subject matter, notwithstanding it might be diametrically opposed to the statement made by said witness while on the stand, and he did not avail himself of that offer; to the *third* he said that, in his opinion, the proposed newly discovered evidence was cumulative, or corroborative, of the testimony of other witnesses who were sworn at the trial in reference to the same subject matter—the prosecutrix' want of chastity.

But the judge made the further point with regard to this newly discovered testimony, that the affidavit of the defendant, alone and unsupported by the oath of the witnesses upon whose testimony the relief depends, was insufficient, and did not justify the allowance of a new trial.

The proposition of the judge seems unanswerable. We have frequently held that it was not a ground for a new trial that the defendant had urged an objection which was overruled, and to which a bill of exceptions had been retained.

That the testimony of a witness has given the defendant surprise, is unfortunate for him; but the only course open to him was to substitute other testimony.

This course was left open to him, and it is no ground for a new trial that he was unable to supply that deficiency. Had he made the discovery of such testimony after the trial, there would have been greater force in his application.

The ground of his application, based upon testimony newly discovered since the trial, does not go to that extent. And, if it did, the motion is insufficient in itself.

III.

The motion in arrest of judgment rests on the charge of unconstitutionality of Act 184 of 1890, in that it makes the abduction of a woman a crime, in direct violation of Art. 29 of the Constitution, in that it embraces more than one object; and that the different objects of the statute are not set out and embraced in its title.

Further, that the title makes no mention of the penalty the statute authorizes to be imposed.

The judge entertained the opinion that the first section of the act—quoted *supra*—which defines the crime of which the defend-

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ant is indicted, is constitutional and valid; and that the title fairly embodied the *single* object of the law in employing the phrase, "making the abduction of woman a crime."

He thereupon overruled the demurrer, and the defendant's counsel reserved a bill of exceptions.

We think the title fairly responds to the object stated in section one of the act, the purport and effect of which is, that any person who shall fraudulently, deceitfully and by any false pretence or representation, entice or abduct any woman of previous chaste character from her home, for the purpose of prostitution, shall be deemed guilty of an infamous crime.

We do not regard the fact, that no mention is made in the title of the act to the character of the punishment which may be inflicted, as of any consequence whatever.

Such a provision of a statute is merely directory, and follows as the natural and legal sequence of the text. The denunciation of the text would be of no force and efficacy without the superaddition of the punishment therefor. It requires *both* to create a penal statute.

Judgment affirmed.

No. 12,428.

STATE OF LOUISIANA VS. GEORGE HEARD.

The pleas were *autrefois acquit* and the invalidity of the proceedings, because of a copy substituted to the indictment lost.

Former Jeopardy.—There was no *autrefois acquit*—the accused had not been arraigned and had not pleaded. It became, in consequence, necessary to discharge the jury prior to verdict. Without a joinder of issue the proceedings are null and can not serve as a basis for the plea of *autrefois acquit*.

Copy of Indictment Lost.—The indictment had been misplaced or lost.

As authorized by Act 17 of 1878, properly a true copy of record kept as required by the statute was substituted. The trial judge was satisfied that the indictment was lost; he therefore had the authority to replace the loss with an authenticated copy and to continue with the trial.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Robert H. Marr*, District Attorney, for Plaintiff, Appellee.

49 375
113 881

State vs. Heard.

Thomas F. Maher for Defendant, Appellant.

Submitted on briefs March 6, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

BREAUX, J. The defendant was found guilty of manslaughter and sentenced to imprisonment at hard labor during a term of twelve years.

The defences are *autrefois acquit*; and the invalidity of the copy of the indictment under which he was tried.

With reference to the plea of once in jeopardy, for the crime charged, he alleged that after the jury had been sworn, it was discovered that no issue had been joined.

We copy from the record:

"Now comes counsel for defence and objects to any further proceedings being had herein, on the ground that there is no issue joined between the State and the defendant."

It appears that after the court had maintained the objection, the defendant's counsel objected to the jury being discharged.

Subsequently the plea of former jeopardy was filed in the District Court and overruled.

In our view, it was properly overruled.

The indicted person not having pleaded as he contended, he was not in jeopardy, though a jury had been sworn to try him. Bishop on Criminal Law, Vol. 1, par. 1029.

A conviction is an absolute nullity unless it affirmatively appears that the defendant pleaded to the indictment. *State vs. Ford*, 30 An. 311.

To entitle the defendant to the plea, the proceedings must have been valid.

He had been permitted by the court to withdraw his plea of not guilty, in order to permit him to file a challenge to the array of the grand jury and a motion to quash the indictment. The court, upon his motion, considered that he should have been arraigned after the challenge to the array and the motion to quash had been overruled, and for that reason, on defendant's motion that the trial could not be proceeded with, discharged the jury.

State vs. Heard.

The defendant was bound by the action of the court, based upon his own showing, that he had not been arraigned. *State vs. Byrd*, 31 An. 419. Moreover, he had not been arraigned; he had been permitted to withdraw his plea; and to stand before the bar as if he had never been arraigned.

"There must be an issue joined before jeopardy can attach." Am. and Eng. Ency. of Law, Vol. II, p. 982.

We pass to the second of appellant's grounds—that he was made to answer, although there was no indictment against him.

We are informed by the recitals of a bill of exceptions that, while the jury was being empaneled, it was discovered that the indictment had been lost or mislaid. The court, being fully satisfied by the record and the statement of the District Attorney, that the original indictment had been lost or mislaid, ordered a copy, as he was authorized to order by Act 17 of 1878, and held the proceedings thereunder regular and legal. The statute in question makes it the duty of the clerk of court, within ten days after the adjournment of any term of court during which any bill of indictment has been filed, to record it; and further directs that in case of the loss or destruction of any recorded indictment, it shall be the duty of the judge, on proof of the loss, to order that a certified copy from the record be substituted for the original, and that further proceeding in the cause be had as on the original. The clerk had complied with the statute, and the judge, after proper substitution had been made, determined that there was no necessity for another copy and another arraignment.

The correctness of the copy is not questioned. It is, in addition, evident that the indictment was not to be found.

The ruling was not in any particular prejudicial to the defence, and was in accordance with the authority conferred by the statute.

Moreover, it was strictly a question of fact. With reference to the question of law, we deem it in point to state that a trial of the issue of the loss of the indictment *vel non* or of the copy, whether a true copy *vel non*, does not appear to have been contemplated by the Legislature in adopting the statute. The loss of the indictment having been shown to the satisfaction of the judge, and a true copy produced in compliance with his order, it then devolved upon the defendant to prove wherein an error had been committed.

In the absence of such proof we think the ruling is correct.

Vance vs. Bank.

Lastly, upon this point the rule is well settled; alleged error will not be considered in a criminal case when the bill of exception does not fully set forth the error complained of. No objection was urged to the mode adopted by the trial judge to satisfy himself that the indictment was lost.

This completes a review of the issues. We find no ground upon which the accused can be relieved.

It is therefore ordered, adjudged and decreed that the verdict, sentence and judgment of the court *a qua* are affirmed.

No. 12,180.

S. W. VANCE VS. FIRST NATIONAL BANK OF SHREVEPORT.*

The maker of a note pledged by the holder who is unable to pay the debt can in a suit settling the rights between the parties require a return of the note pledged, or claim its value in case it be not surrendered.

Prior decree amended so that the deposit of the notes and deed in court are not required.

As amended prior decree affirmed.

On Application for Rehearing—Interest on a stated account on which charges are erroneously made is reduced from 12 per cent. to 5 per cent.

The plaintiff will have credits for the deed of trust and notes of six thousand dollars each, as will, as to their value, be established by testimony, provided there be a timely deposit made in court of these securities.

A PPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

Leonard & Randolph and *F. G. Thatcher* for Plaintiff, Appellee.

Wise & Herndon for Defendant, Appellant.

Argued and submitted June 5, 1896.

Opinion handed down June 20, 1896.

Argued and submitted on application for rehearing November 21, 1896.

*The statement of the case (covering the decided points) made by the organ of the court, in the foregoing case (p. 130), having been published without the name of the judge who decided the case, it was concluded to publish the decision in full.—[REPORTER.]

Vance vs. Bank.

Opinion handed down December 14, 1896.

Opinion handed down on second application for rehearing January 4, 1896.

Rehearing refused January 4, 1897.

The opinion of the court was delivered by

BREAUX, J. The defendant instituted a suit to foreclose on mortgage notes, executed by plaintiff for fifteen thousand eight hundred dollars. The bank held these notes as pledges to secure an indebtedness of S. J. Zeigler, the original holder.

The plaintiff obtained an injunction to restrain the defendant from foreclosing the mortgage on the ground that he is not indebted to the pledgor, Zeigler, and that, as the notes were pledged after maturity, they are subject to all offsets and equities.

It is not disputed that the mortgage notes were pledged after their maturity. In consequence the defendant must meet the issues raised by plaintiff.

Vance, the plaintiff, carried on in connection with Wyche, under the name of Vance & Wyche, a plantation store. He was in addition engaged in planting.

From 1887, date of Zeigler's first account, to 1898 he had the entire confidence of his young brother-in-law, the plaintiff.

The balance on account, rendered at different times to the plaintiff, was large.

The plaintiff claims that some of the items were improperly charged to him and that certain credits have not been given him on Zeigler's books.

The accounts of Vance and Wyche with Perrin and Zeigler were closed by note.

S. W. Vance's account with Perrin and Zeigler for 1888 was closed by note.

After the dissolution of the commercial firm of Vance & Wyche the balance against this firm was charged to Vance, the plaintiff, with Vance's consent, the defendant contends.

Zeigler testifies that in July of that year the amount of plaintiff's indebtedness having increased more than he had anticipated that it would increase, for that reason other mortgages were taken.

In February, 1890, Zeigler says that plaintiff's indebtedness was

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so large that he requested a partial payment; that he, plaintiff, finally agreed to borrow an amount, and with that object in view they called on Jacobs, of the defendant bank, who consented to make the loan on the collateral security offered, provided Ziegler executed a note for the amount with the collaterals attached. He further states as a witness that he explained to the lender that it was not for himself but for the plaintiff, to enable him to make a partial payment. He says further that the ten thousand dollars in cash borrowed were received and placed to the credit of Vance & Wyche's account and a receipt given; that a short time afterward a statement was rendered to them showing that it was to their credit.

The plaintiff was present at this interview; he denies, however, that the loan was for his account.

At the maturity of the note it was paid by the maker Zeigler and the collaterals were returned to him. Afterward, on the 7th of April, 1892, he gave the collateral security previously taken up by him to the bank as collateral to secure an indebtedness then incurred by Zeigler to the bank. Zeigler failed in 1892, a short time after this loan.

It is claimed in this suit on the part of the defendant that it has the right to compel Vance to pay the notes held by it as collateral security.

One of the grounds of defence is that the notes held by the bank were given Zeigler only to secure payment of advances to plaintiff for the year 1889.

That out of the crop of that year he shipped cotton sufficient to pay these advances and thereby satisfied the note and mortgage. Another ground of defence is, that without reference to the proceeds of the crop of that year Vance was not indebted to Zeigler on the 7th of April, 1892.

In stating the facts of the case it becomes necessary to return to the accounts and give consideration to the different items upon which balances are based.

Perrin and Zeigler's accounts rendered prior to March 14, 1888, show a balance due by Vance, which should have been charged, he urges, to Mrs. M. B. G. Vance, his mother, and plaintiff—i. e., half to each, as they were partners for whom the payments had been made by Zeigler.

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It is claimed that he is entitled to other amounts as credits than those allowed in the accounts in evidence.

The amounts improperly charged as averred by plaintiff, Vance, are the following, viz.:

1898.		
April 2—8. Self, should be, it is contended, Wash. Vance.....	\$860 00	
May 5—9. Miss Molly Vance.....	43 00	
August 1—10. G. W. Sentell & Co., for Wash. Vance.....	200 00	
November 10—11. G. W. Sentell & Co., for Wash. Vance.....	250 00	
November 5—13. Miss C. Vance, only one-third of amount charged, due by plaintiff, it is claimed.....	66 66	
November 5—14. Interest.....	242 87	
November 5—15. Interest.....	436 81	
November 5—16. Interest.....	78 47	
1889.		
February 5—12. Interest.....	200 50	
		\$1,830 81

The witness Zeigler admits that all items charged in plaintiff's account as money remitted G. W. Sentell & Co. was to pay the expenses of plaintiff's brother, a minor, and that it should not have been charged to plaintiff, Vance. It was done, he says, through a misunderstanding of the book-keeper.

We will later recur to the other items of this account.

Taking up the account of 1889; here, also, it is charged that many of the items are not due by the plaintiff, and he claims that others should be placed to his credit. In addition to those carried in the name of Sentell & Co. for Wash. Vance, the following are claimed, as having been improperly charged:

November 27—No. 19. M. B. G. Vance.....	\$60 80
September 12—No. 22. Note due April 1, 1889, given in error for Perrin and Zeigler account.....	8,800 66
September 12—No. 23. Interest.....	318 92
September 12—No. 24. Interest.....	222 90

The note stated will be considered later.

The only item not a remittance to Sentell & Co. for Wash. Vance is an entry November 7, No. 28: Remittance to Miss O. Vance.

To this item we have found no reference in the testimony.

The following are the items charged in 1891, which are, plaintiff alleges, erroneously charged:

January 20—No. 29. Account of Vance & Wyche.....	\$1,768 18
" " " 30. Difference in interest.....	1,992 25
February 21. " 31. Interest on notes.....	1,100 00
March 2. " 32. G. W. Sentell & Co.....	200 00
" 25. " 33. Miss Molly.....	76 00
July " " 34. E. Jacobs, part on note.....	600 00
" " " 35. Interest.....	796 00
" " " 36. Miss Vance.....	9 00
" " " 37. G. W. Sentell & Co., for Wash. Vance.....	115 80
" " " 38. Interest.....	968 70

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The Wash. Vance items were deducted in the account as having been erroneously charged.

The question arises shall we deduct from the account of Zeigler all the items plaintiff asserts are incorrectly charged to his account, and charge him (Zeigler) with the amounts proven correct, for which he has not heretofore given plaintiff credit?

As to the latter, it does not admit of question; they must be charged.

It is a matter of detail that will receive attention in the decree.

As to the former, the evidence is conflicting. It remains that the burden of proof is with the plaintiff, Vance, and that, with the exception of his own testimony on this point, the evidence sustains defendant's position.

The orders of Vance were not written so as to enable Zeigler to separate the items. On their face they were for the account of the one by whom signed. Accounts were rendered, and no objection was made.

A meeting was held at the town of Benton in March, 1893. There were present at this meeting the plaintiff and members of his family. They were represented by counsel and no objection was made to these items. As to Wash. Vance's indebtedness it was explained by Zeigler as a witness that S. W. Vance would give orders to remit moneys to Wash. Vance. The former's indebtedness increased to such an extent that he inquired of S. W. Vance if those items were not properly chargeable to the account of Wash. Vance? He assented to a change, charging to the latter. At the meeting of 1893 these credits had been given to S. W. Vance, who did not claim any other credits.

This witness, Zeigler, further says that S. W. Vance always said that he was keeping these accounts against the before named members of his family, and that they owed him a great deal. He also states as a witness that he would have much preferred to charge those items to the mother and sister of Vance, as they were solvent and he had cause to fear that Vance was not. He was not given needful information to make such a charge, he did not know that the items were for them, but was led to believe by Vance that they were for his own account. This testimony is corroborated in part by that of the book-keeper who kept the books and made the entries of these items.

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S. W. Vance testifies: "The debits on these accounts were for different things, such as improvements, items charged erroneously on Zeigler's account and other things. It was goods that were charged to me and to Vance & Wyche that was for them. I kept an account in the books so that I would have a settlement with all of them."

As to the commercial firm (Vance & Wyche) there is evidence of record that the change in the account from Vance & Wyche to Vance was made with the consent of S. W. Vance; moreover, Vance was responsible for the whole debt without the necessity of any consent.

Vance knew that his creditor had pledged these claims and he never objected. He was, at least, present when the loan on pledge was discussed with the pledgee Jacobs. Zeigler and his pledgee acted upon the faith of the correctness of these charges.

Concluding upon this point, we quote from the testimony of S. W. Vance: "When we could get goods from Hicks & Co., and pay for them by orders on Zeigler, we would not inform him for whom we were getting the goods, but would make the proper charges on our books." Zeigler positively denies that he was ever informed of purchases for any other than the plaintiff himself.

The following items do not seem to be disputed: Numbers 8 (as above), 9, 10, 11, 12, 13, 21, 28.

As relates to item 22, the note is subject to the deduction of amounts erroneously charged; the same is true of item 29.

Item 39 also is erroneous. Interest on Zeigler's indebtedness to Jacobs, or to the defendant, should not be charged to the plaintiff. For the same reason item 34 is also erroneous.

The foregoing all relate to the account of Perrin and Zeigler transferred to the latter.

On another, the account (Abstract B) due Zeigler, growing out of transactions personal in character, there seems to be no dispute about the rent of December 1, 1887, (1) Coushatta plantation, year 1887, \$166; December 11, (2) Coushatta plantation, \$100; December 11, (3) one-third rent Haynes place, 1888, \$150; January 1, (4) Improvement South Buck Hall. That is, that these items should, as erroneous, be deducted.

Item 5, January 1, 1889, also for improvement of South Buck Hall, is admitted by Zeigler in answer to interrogatories.

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Item 8 also should be corrected; February 26, 1889, by allowing credit to plaintiff on note transferred by Zeigler to Perrin; amount not credited and balance due on the note held by the succession representatives against Zeigler as maker.

Items 9 and 10 are charged on account, seem to us correct, by plaintiff and cover December, 1889, rent Haynes place, \$150; December, 1889, rent Coushatta, \$70.

A credit of \$12,000 is claimed for two notes, secured by mortgage given by Vance to Zeigler in 1891 in pledge by the holder to the Merchants and Farmers Bank. We do not find it possible to determine the value of these mortgage notes at this time.

The insolvency of the maker does not seem to be questioned and there is no evidence of record showing the value of the property.

The maker will be entitled to the credit remaining after his indebtedness will have been settled; for whatever balance there may be. It is not, in our judgment, chargeable against Zeigler or his transferee at this time. There is variance in the testimony relating to the deed of trust of land in Arkansas. We do not think that we would be justified in decreeing that plaintiff be credited at this time.

The value of the pledged property is not shown. After settling and paying the amount of his indebtedness the plaintiff will be entitled to the pledged property not applied to the payment of his debt.

It is admitted that plaintiff should be charged with thirteen hundred dollars rent for 1891, and a sum of five hundred and eleven dollars and eleven cents; amount of a judgment of Dreyfous & Co. with which Zeigler should be charged, and which Vance does not contest.

The plaintiff has introduced testimony to prove that the notes held by the defendant had been given only to secure advances for 1889.

It will be borne in mind that ten thousand dollars was the sum borrowed and placed to plaintiff's credit, or to plaintiff and Wyche, the commercial firm. This loan plaintiff says was paid by shipment and sale by Zeigler of the crop of 1889, as acknowledged, he asserted, by Zeigler himself.

This position is controverted, and Zeigler denies that he made such an acknowledgment. As a naked original proposition, the testimony on this point is against him—plaintiff.

This acknowledgment in the course, as we understand, of a friendly conversation does not absolutely conclude the parties.

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From the facts we gather that Vance did not demand his notes thus deposited as collateral; that he executed other mortgage notes for a large amount, and placed them in the hands of his creditors without any consideration whatever, unless it was to secure the indebtedness. The crop of 1889 amounted to about six thousand seven hundred dollars. The difference between the advance and the amount of the crop was due by the plaintiff.

The conclusion does seem reasonable that, as between the defendant and Zeigler, the former owns the latter's right on the accounts, notes and mortgage, and that for the balance due Vance, plaintiff is indebted to the defendant bank.

After the plaintiff will have secured all his rights, and all proper deductions will have been made, it can not be of great concern to him whether he pays Zeigler or the defendant.

In calculating the interest, plaintiff complains of the amount of interest and of the compound interest charged.

These calculations were made years ago. We do not think we are authorized to strike out the interest entirely.

In making needful deductions to carry out our decree, the interest charged on the amount deducted must also be deducted.

In conclusion, our summary is:

Deduct items 8, 9, 10, 11, 13, 14, 15, 16, 12, 19, 29, 30, 33, 34, 36, 37.

That all interest charged on amount deducted be also deducted at the rate charged.

The plaintiff is entitled to credit of the following not given on accounts rendered:

1887.	
December 1—1. One-sixth rent Coushatta, year 1887.....	\$166 00
1888.	
December 2—2 One-sixth rent Coushatta, year 1888	100 00
December 2—3. One-third rent Haynes Place, year 1888.....	150 00
1889.	
January 1—4. Improvement South Buck Hall.....	250 00
January 1—5. Improvement South Buck Hall	250 00
February 26—6. Credit which should have been given on the R. W. Vance note:	
Credit admitted on paper (R. 114, 1-2).....	486 09
Rent of Haynes Place (R. 114, 1-2).....	150 00
Rent of Coushatta.....	70 00
1892.	
February 13-15. One-eighth purchase price Haynes Place	604 00

The following claims are allowed to defendant:

Rent note	\$1,300 00
Judgment Dreyfous & Co.....	511 11

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The notes, each for \$6000, secured by mortgage, given by Zeigler to Vance, and by Zeigler negotiated with Merchants and Farmers Bank, is left open with rights of parties reserved.

The deed of trust—lands in Arkansas—is left open also for future adjustment.

It is ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is ordered and adjudged that all items be deducted as stated in the foregoing opinion; that proper credits be allowed as detailed above; interest, cost and balance of indebtedness fixed in accordance with the view herein expressed.

It is further ordered, adjudged and decreed that the injunction be dissolved to the amount that the plaintiff is indebted to the defendant, after deductions as decreed; that it be made perpetual in so far as it enjoined the defendant from collecting an amount not due, as shown by balance fixed in accordance with view herein expressed.

The defendant to pay the cost of the lower court, and the plaintiff and appellee those of the appeal.

ON APPLICATION FOR A REHEARING.

We have, on this application for a rehearing, made the additional deductions on Zeigler's account and allowed the additional credits, as we think authorized under the testimony. We have reduced the interest charged, and allowed on the accounts, from 12 per cent. to 5 per cent.

With reference to the deed of trust for the Arkansas land and the two notes of six thousand dollars received by Zeigler from Vance, we do not think the mere giving these notes and deed of trust, not received in payment, authorizes us to give the credit for the face amounts of the notes and deed. We have no evidence of the value of the notes and deed, and it follows, no basis to give credits. We think the plaintiff should have such credits for the deed of trust and notes as may be established by the testimony as to their value.

We allow to plaintiff the item: January 9, 1890, improvement South Buck Hall. It was credited on statement of Zeigler, offered in evidence, but it was not credited on the account.

Amount thus allowed, two hundred and fifty dollars.

The terms of our decision already include the amount of two hun-

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dred and twenty-nine dollars and ninety-five cents, items on the Wyche and Vance account which are for Wash. Vance.

The claim for five bales of cotton we do not think is sustained by the facts.

In calculating interest on balances (difference on interest charged on the account), there should be only one deduction, and not a deduction of interest prior to a change in the charge and on the amount after the change. One credit or one debit for interest.

It is therefore ordered, adjudged and decreed that the last amount shown to be due by Vance to Zeigler by the last and closing account of April 7, 1892, be diminished by deducting seven per cent. of all the interest charged to Vance on the accounts in evidence; and that the indebtedness of Vance be allowed the additional credit stated in the opinion; interest at five per cent. to be allowed on such credits, and that with these deductions and credits the indebtedness of Vance to Zeigler is hereby fixed on the basis shown to be due by said account of April 7, 1892; that the amount of indebtedness is recognized subject to the deductions and credits herein given. The balance due shall bear five per cent. interest from April 7, 1892, until payment.

It is further ordered and decreed that the indebtedness of Vance to Zeigler on account and notes thus established be reduced and credited for such amount as may be deemed ascertained to be the value of the deed of trust and two notes of six thousand dollars (if the latter has any value at all as against the property previously mortgaged); said value to be ascertained by testimony on the appropriate proceeding to establish such value.

In establishing the value of these notes, due regard is to be given to the rank of mortgages not affected by the rules of the commercial law relating to securities subject to equities.

Further, that plaintiff be and is hereby decreed entitled to proceed with his seizure and sale on the amount found due in accordance with this decree.

Costs of both courts to be paid by the appellees. As amended here, our decree is affirmed.

We reserve to the parties the right to apply for a rehearing.

OPINION ON APPLICATION FOR REHEARING.

The many details in this case have made another examination necessary.

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Plaintiff, in one of the statements of record, shows "to one-half of account of S. W. and B. G. Vance, one thousand four hundred and two dollars and fifty cents." This is an additional amount to which the defendant is entitled.

In our opinion on the rehearing is the following:

We have reduced the interest charged from twelve per cent. to five per cent.

In the decree by a slip of the pen the following was written: "Diminished by deducting seven per cent. of all interest charged to Vance." This is corrected and the decree will now read that the reduction of interest is from twelve per cent to five per cent. as written in the body of the opinion.

Appellant directs our attention to the ten thousand dollars loaned by E. Jacobs.

We extract the following statement from appellee's first brief:

April 7, 1892. To balance shown by account rendered	\$10,367 77
To one-half of account of S. W. & M. B. G. Vance, \$2806, one half	1,403 50

(The item allowed above.)

To credit matter, credit given Vance & Wyche	\$10,000 00
To rent year 1891	1,300 00
To judgment, Dreyfous & Co	511 01

We have heretofore decided that these \$10,000 were properly charged to Vance.

It is incumbent upon plaintiff to prove that this amount of \$10,000 has been paid or settled in some way, otherwise he must stand charged with it. His right to prove payment or settlement of this amount is reserved. This is one of the issues upon which the judge *a quo* will have to pass.

As to items as follows, viz.:

January 1, 1887. Improvements on South Buck Hall	\$260 00
January 1, 1889. Improvements on South Buck Hall	250 00
January 1, 1890. Improvements on South Buck Hall	230 00

Vance is entitled to these three credits for these improvements—no more.

The appellee sets forth in his brief, that five per cent., if allowable at all as commission for attorney's fees, should not exceed five per cent. on the amount as will be fixed by decision of this court.

The fee is thus limited; that is, the fee is allowed on the amount the court finds is due by Vance to Zeigler or his transferee.

The counsel of the appellee in his brief says:

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"That the court should not require Vance to deposit these notes in court *a qua* as a condition precedent to his right to a credit for their value to be ascertained by testimony. But that, possibly, Vance might induce the holders of these notes to present them in court *a qua* on trial of proceedings to ascertain their value for purposes of identification and to show who is holder at that time."

We do not think, after further consideration, that it is essential for Zeigler, the defendant, or Vance to surrender the deed of trust or the two notes of six thousand dollars each, signed by Vance as maker.

The investigation can be held as to value and credit given to Vance of the amount of this value, without the necessity of having the papers in court.

To Zeigler is reserved the right of surrendering the notes and deed of trust, and upon that surrender of being relieved from having the claim reduced on account of the notes and deed of trust being outstanding.

But if he does not produce and surrender the said notes and deed of trust, then, in that case, the value is to be ascertained, and he is to be charged with their value as ascertained.

It is therefore ordered, adjudged and decreed that prior decrees are in force save as amended in this decree.

That the sum of fourteen hundred and two dollars and fifty cents is allowed as an additional credit to defendant.

That the reduction of interest is from 12 per cent. to 5 per cent.—
i. e., interest at rate of 5 per cent. is to be computed, instead of 12 per cent.

It is further ordered, adjudged and decreed that right is reserved to plaintiff to prove that the ten thousand dollars loaned by Jacobs to Zeigler, and by the latter to Vance & Wyche, and subsequently charged to Vance have been paid or settled.

It is further ordered, adjudged and decreed that plaintiff be allowed three years' credit for improvements of South Buck Hall.

It is also decreed that the attorney's fee be limited to 5 per cent. on the amount, when fixed by the decision of court.

And lastly, it is ordered and decreed that plaintiff be relieved from the necessity of producing and surrendering the notes of six thousand dollars each, and that Zeigler be relieved from the necessity of producing and surrendering the deed of trust.

Mortgage Co. vs. Peirce et als., Consolidated.

It is ordered that to Zeigler is reserved the right of surrendering the notes and deed of trust, and upon that surrender of being relieved from having the claim reduced (as to their value), on account of the notes and deed of trust being outstanding.

It is further ordered and decreed, if he does not produce and surrender the said notes and deed of trust, then, and in that case, the value is to be ascertained, and he (Zeigler) or defendant is to be charged with their value, as ascertained.

The questions have been argued orally and by brief; a rehearing would serve no purpose.

It is therefore refused.

No. 12,861.

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49	390
115	423

AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, LIMITED, vs. J. CALDWELL PEIRCE; INTERVENTION OF PHILIP B. PEIRCE ET ALS. AND PHILIP B. PEIRCE ET ALS. vs. J. CALDWELL PEIRCE ET ALS. (CONSOLIDATED).

A foreign corporation lending money to a resident of this State, through brokers domiciled out of the State, does not come within the meaning of Art. 236 of the Constitution of the State. *Mortgage Co. vs. Ogden, ante*, p. 8.

If the seized debtor obtains credit for the amount of his debt he can not object to any arrangement made by the plaintiff with the purchaser. All the debtor could require would be that the debt should be declared discharged. *Bandin vs. Roliff*, 1 N. S. 166; 8 N. S. 100.

A sale of minor's property, through executory process, taken contradictorily with their father as their tutor, is valid, though no certificate of the amount of the inventory of the property of the minors has been recorded as required by law, when the father having been appointed as their natural tutor by the court, he has taken an oath as such, and letters of tutorship have issued to him. The father has the right under such circumstances to stand in judgment defensively for the minors as a tutor *ad hoc*, under Art. 313 of the Civil Code, even though he be not authorized to administer generally as tutor.

APPEAL from the Eighth Judicial District Court for the Parish of Concordia. *Tullis, J.*, Twenty-third District, sitting in place of the judge of the Eighth Judicial District, recused.

H. R. Boyd for Plaintiff, Appellant.

Mortgage Co. vs. Peirce et als., Consolidated.

Thomas P. Clinton for Curator of Shattuck & Hoffman, Defendant and Appellee.

Boatner & Hough for Heirs of Mrs. Peirce, Intervenor, Appellees.

Argued and submitted January 19, 1897.

Opinion handed down February 1, 1897.

STATEMENT OF THE CASE.

On the 26th of February, 1885, Mrs. Charlotte H. Peirce, wife of J. Caldwell Peirce, granted a mortgage on the Delhi plantation, in the parish of Concordia, to Gilbert M. Richardson, of New York, to secure a loan of four thousand dollars. The plantation was her separate property. The act contained a clause waiving the benefit of appraisement in case of forced sale. On the 8d of April, 1885, Mrs. Peirce died, leaving four minor children.

On April 28, 1885, J. Caldwell Peirce, the father of the children, applied to be confirmed as natural tutor of the minors. He asked that an inventory be taken, and annexed an oath that the district judge was absent from the parish. On the same day the clerk of the District Court ordered that the applicant be appointed and confirmed as natural tutor upon taking oath and otherwise complying with all legal requisites. The same day an inventory was taken, and the oath of the father was filed. No certificate of the amount of the inventory seems to have been recorded, or to have been issued by the clerk. 'On the 25th of April, 1885, James O. Brandon, the maternal uncle of the minors, was appointed as under-tutor of the minors, and qualified as such on the 25th of May, 1885.

On the 28d of April, 1885, the district clerk issued to the father letters of appointment and qualification as tutor (12 An. 611), the letters reading: "Whereas J. Caldwell Peirce has taken the oath and otherwise complied with the law, he is, therefore, appointed natural tutor and *ex-officio* administrator to the minors (naming them). Witness the Hon. S. Charles Young, judge of said court and the seal of said court."

Default having been made on the payment of one of the notes secured by the mortgage to Richardson, executory proceedings were

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instituted on the 2d of March, 1887, for the amount due, three thousand and two hundred dollars, and interest, less a credit of one hundred and fifty-nine dollars, before the District Court for Concordia parish. J. Caldwell Peirce, as natural tutor and *ex-officio* administrator, accepted service of notice of demand and order of seizure and sale. The Delhi plantation was seized and advertised and, on the 7th of May, 1887, sold by the sheriff. At the offering it was adjudicated to F. B. Hoffman, of the firm of Shattuck & Hoffman, of New Orleans, for the price of four thousand four hundred and one dollars. The purchase was made by Hoffman through H. R. Steele, acting as his agent and attorney in fact, and, by direction of the attorneys of the seizing creditor the price of the adjudication was credited upon the writ and the writ returned.

On the 14th of June, 1887, Hoffman, through Steele as his agent, sold the property to J. Caldwell Peirce for the sum of three thousand five hundred and ninety-three dollars. On the 17th of January, 1889, J. Caldwell Peirce mortgaged the property to the plaintiff company to secure a loan of four thousand six hundred and forty dollars.

On the 11th of November, 1890, he executed a second mortgage on the same property to secure an additional loan of one thousand dollars. Peirce having defaulted in the payment of the interest and principal falling due on both of the loans, the plaintiff on the 2d of April, 1895, presented a petition to which he annexed the notes and mortgage for the second loan and prayed for and obtained an order for the seizure and sale of the property subject to the first mortgage.

Before seizure was made Peirce obtained an injunction against the execution of the order. The ground assigned for injunction was that plaintiff was a foreign corporation and had violated all of the provisions of Art. 236 of the Constitution of Louisiana relative to foreign corporations doing business in Louisiana, and further that the plaintiff was proceeding against him and asking judgment on a demand made up partly of illegal and usurious interest—that five of the notes in the act of mortgage were largely made up of capitalized interest at the rate of 10 per cent., which amount, together with the 10 per cent. attorney's fees thereon, exceeded the sum of three hundred dollars.

That plaintiff had elected by his petition to claim the maturity of the whole debt by reason of the default of payment on the 4th of May, 1894, and that they could not proceed to collect said capital-

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ized interest not earned at or subsequent to said date; that said portion of said debt if it existed was extinguished thereby; that the injunction should be perpetuated, but should the same be dissolved the amount of the debt should be reduced by said amount as illegal, inequitable and usurious.

On May 28, 1895, the children of Mrs. Peirce filed an intervention in the suit setting up that they were the sole heirs of Charlotte H. Peirce; that after her death their father made application to be appointed and confirmed as their natural tutor, but that he did not comply with the law; that no true and faithful inventory was made; that no certificate of the amount of the inventory of the minors' property was recorded in the mortgage record book; that their father went into possession of the property, and subsequently, in the year 1886, entered into a correspondence with Shattuck & Hoffman, who held a mortgage on Delhi plantation for about four thousand dollars, executed by their mother, by which arrangement the said mortgage should be foreclosed, and the title to the property should be made to vest in the father, J. O. Peirce. That in pursuance of said arrangement, Shattuck & Hoffman foreclosed their mortgage, proceeding in the foreclosure contradictorily only with their father as their tutor. That Hoffman, one of the firm of Shattuck & Hoffman, bought at the sale, bidding the amount of the debt due them. That he subsequently sold the plantation to their father for just the amount of the debt and that that sale was illegal. That the present plaintiff had knowledge of all these facts when they made the loans to their father; that the mortgages were illegal and should be canceled, and they so prayed. That the loan by Gilbert M. Richardson to their mother was in reality a loan by Shattuck & Hoffman, Richardson being merely a party interposed; that the executory proceedings in the name of Richardson were really proceedings taken out by Shattuck & Hoffman in furtherance of the arrangement made between that firm and their father by which the title to the Delhi plantation should be shifted from the succession of their mother to their father. The knowledge of all the facts of the case, which it is alleged the plaintiff company had, is claimed to have been communicated to them through Francis Smith, Caldwell & Co., who, it is asserted, acted as their agents in lending to Caldwell Peirce the moneys for which the mortgages held by the plaintiff stand as security. Further charging that plaintiff was

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a foreign corporation transacting business in Louisiana, without having complied with Art. 236 of the Constitution. Plaintiff company, the American Freehold Land Mortgage Company, Limited, answered, declaring the validity of the father's appointment as tutor—denied intervenor's right to attack that appointment collaterally—alleged that they took the mortgages on the strength of the public record, denied all knowledge of the facts charged to have been brought home to them—denied that they were doing business in Louisiana, but averred that they had complied with the provisions of Act No. 149 of 1890—and that the provisions of Art. 236 of the Constitution were inoperative until the passage of that act—they pleaded also the prescription of five years against the intervenors. They answered Caldwell Peirce's petition in injunction with practically the same allegations.

On the same day that the intervention of the heirs of Mrs. Peirce was filed in the present executory proceedings the same parties brought in the District Court for Concordia an independent suit against Shattuck & Hoffman, Richardson and J. Caldwell Peirce on grounds substantially the same as those urged in their interventions, and praying for a judgment canceling and setting aside the sales and transfers, and asking for judgment for fruits and revenues.

The curator *ad hoc* appointed to represent Shattuck & Hoffman and Francis B. Hoffman, answered, setting up that the British and American Mortgage Company, and not Shattuck & Hoffman, loaned the money to Mrs. Peirce, the payment of which was secured by the Richardson mortgage. On behalf of the parties the curator represented, he maintained the validity of Peirce's appointment as tutor, the regularity and validity of the sale made under the Richardson mortgage, and by way of reconvention prayed that that mortgage be reinstated against the property if the sale should be found to be illegal and void.

The two causes were consolidated and tried together. After trial a decree was rendered by the District Court recognizing intervenors as owners of the Delhi plantation, decreeing the two mortgages executed by Caldwell Peirce to the plaintiff to be null and void, and setting aside the sale made under the Richardson mortgage.

In the opinion of the court *a qua* the father, by reason of the fact that he was in community with his deceased wife, was authorized, under Art. 1146 of the Civil Code and the interpretation placed upon

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that article in *Bland vs. Lloyd*, 24 An. 608, to buy the property though it was not community property, but it held that the appointment of the father as natural tutor was null and void for the reason that the certificate of the amount of the inventory of the minors' property had not been recorded. From this judgment the plaintiff company, Shattuck & Hoffman and Francis B. Hoffman have appealed. J. Caldwell Peirce has not appealed. Appellees have asked no amendment of the judgment as rendered.

The opinion of the court was delivered by

NICHOLLS, C. J. The attack upon the mortgages executed by J. Caldwell Peirce to the plaintiff company, in so far as it is based upon the claim that plaintiff was doing business in Louisiana in violation of Art. 236 of the Constitution, must fail. The facts of this case bring it under the principles laid down in *Reeves vs. Harper*, 43 An. 516, and *Scottish American Mortgage Co., Limited, vs. W. F. Ogden, ante*, p. 8.

Intervenors claim that the loan to Mrs. Peirce, though apparently made by Richardson, was in point of fact made to her by Shattuck & Hoffman, and that in the taking of the notes and mortgage and in the proceedings which resulted in the sale of the Delhi plantation, Richardson's name was simply used in order to interpose a third person between Shattuck & Hoffman and Mrs. Peirce and her heirs. We find under the evidence no foundation for that charge. There is no reason assigned why at the time of the loan to Mrs. Peirce there should have been any concealment of the actual facts of the case. The property belonged to her; she had a legal right to contract the debt she incurred and to grant the mortgage she did, and even up to the present time there has been no contention as to her not having been legally bound both as to the debt and as to the mortgage. The loan in question made to Mrs. Peirce was really made to her by the British and American Mortgage Company, through Richardson, and the notes and mortgage given were held by that corporation and not by Shattuck & Hoffman. It is charged that the sale made under the Richardson mortgage was the result of an agreement or combination between Shattuck & Hoffman and J. Caldwell Peirce, the father of the intervenors, to bring about for the benefit of the latter, and to the injury of the chil-

dren, the shifting of the title of the plantation to the husband from the succession of the wife. We do not find this to have been the fact. The correspondence between the firm and Peirce discloses that the British and American Mortgage Company, holders of Mrs. Peirce's notes and mortgage, had become alarmed at her death lest by some judicial proceedings a sale should be made in the settlement of her succession which would raise the mortgage and transfer their rights to the proceeds of sale. They were unwilling that this should happen, or that matters should remain any longer as they were; they therefore insisted upon immediate payment, or that a sale should be made and that their rights should be secured to their satisfaction. Peirce, so far from, at that time, seeking to transfer the title to himself, wrote a letter to Shattuck & Hoffman, complaining that immediate payment was being insisted upon, and the latter replied, explaining the exact situation and from what quarter came the demand. They informed Peirce that they had no control over the matter; that they had to follow the instructions of the company, between whom and Shattuck & Hoffman there seems to have existed business relations of some kind. It is not pretended that either Peirce himself, or the succession of his wife, was in a condition to make the payments which were exacted. The British and American Mortgage Company had the legal right to enforce payment, and neither Peirce nor the succession of the wife could control the corporation in the exercise of that right. They were without power to stay the executory proceedings which followed. The sale which resulted from these proceedings was a public one, at which any person was at liberty to buy. Had the seizing creditor bought precisely for the same price at which the property was adjudicated, there could certainly have been no legal obstacle in the way of its doing so, if the proceedings themselves were proper and legal. Nothing was done or alleged to have been done which was either intended to deter bidders or to have resulted in doing so. It is argued that the price bid was much below the actual value of the property, but the mortgagor, the mother of the intervenors, had herself waived the benefit of appraisement, and she was bound by her agreement. There was no legal reason why Hoffman, of the firm of Shattuck & Hoffman, should not buy the property at the offering. When the adjudication was made to him and the price (under the orders of the attorney of the seizing

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creditor) was credited on the writ, the debt of Mrs. Peirce was instantly as between her and the British and American Mortgage Company paid and extinguished and the ownership of the property passed at once to Hoffman. The seizing creditor could have donated the price to the purchaser or they might have consented to payment of the price by means of novation. In either event the seized debtor could not object. (*Baudin vs. Roliff*, 1 N. S. 165; *Id.*, 8 N. S. 100.) Whether Hoffman ever paid the English and American Mortgage Company, or when or how they paid the amount of the bid was a matter between those parties which did not concern the seized debtor. All that the debtor could require was that the debt should be declared discharged. If either the seizing creditor or Hoffman, looking forward to the possibility of becoming a purchaser at the sale, had in view of that contingency made promises or arrangements (based upon that fact) with Peirce, this would have been doing with their own what they had the right to do. If the title passed to Hoffman by the sale (as it did) the seized debtors had no ground of complaint; certainly none so far as Hoffman was concerned that he should make use of his own ownership so as to benefit their father. They might be able to find fault morally with their father that he should not subsequently have given them the benefit of any arrangement which he had been able to make, but they could not make their father's preferring to follow his own interests than theirs (if such was indeed his course) turn to the disadvantage of Hoffman, who owed them no duty. In *Amato vs. Erman & Cahn*, 47 An. 978, referring to a complaint of a similar kind sought to be urged against mortgage creditors, we said: "If those parties had a legal mortgage on the property they were free to enforce it, and if they enforced it and cut off by becoming purchasers at the sale all rights of the creditors of Sorrel upon the property itself, transferring whatever claims creditors might have to the proceeds of sale, they were at liberty to do with their own what they pleased, and if they thought proper to transfer the property to a third person in order that Erman & Cahn might derive a benefit from it, that fact could not result in divesting them of rights which had legally vested in them under their execution. (*Gilkerson, Sloss & Co. vs. Bond & Williams*, 44 An. 844.) "The creditors might perhaps (if the special agreement was one which would enable their debtor to evade their pursuit in the future) attack the agreement

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itself or make it turn to their own advantage, but they could not oust the purchaser from the property.”

It can not be pretended here that the English and American Mortgage Company were not legally authorized, holding a valid mortgage to force the property to sale as they did, nor that Hoffman was not at full liberty to buy as he did. It would be a strange result if, notwithstanding the concurrence of those two facts, the exercise of both rights should be followed by the consequence that the property should remain the property of the heirs, of the debtor, not only without having themselves paid the debt for which it stood mortgaged, but freed from that debt directly and indirectly. It is not asserted that the English and American Mortgage Company in foreclosing had any other object in view than to safeguard and protect their own interests. When Hoffman bought at the sale he became bound for the price; when he paid this price he became entitled to protection defensively, and, within certain limits, as against the seized debtor and her heirs through the rights of the seizing creditor. There existed at once such a privity between the seizing creditor and the purchaser as to authorize him to call on the latter and appear and defend the title, or directly avail himself of any legal or equitable defence by which the creditor might oppose the action. *Judice vs. Kerr*, 8 An. 462; *Upsher vs. Briscoe*, 37 An. 154; *Seawell vs. Payne & Harrison*, 5 An. 255; *Scott vs. Featherston*, 5 An. 314; *Wolf vs. Lowry*, 10 An. 274; *Colron vs. Millaudon*, 3 An. 664.

Whether this right of protection springs from defensive equitable subrogation or the application of the principle that the debtor should not be permitted to enrich himself at the expense of another (*Childress vs. Allen*, 3 La. 480), we need not here consider.

The intervenors have succeeded in this suit, as between themselves and their father, in reinstating in themselves the title of which they were divested by the suit of the English and American Mortgage Company. Their father acquiesces in that judgment. The plaintiffs in this suit have no further interest in the question of title than to see that their mortgage rights, which they acquired on the strength of the title of *J. Caldwell Peirce*, as it appeared of record under judicial proceedings, should be fully recognized and enforced.

It would not follow, as the necessary consequence of the intervenors being decreed to be the owners of the property, that plaintiff's mortgage rights should fall. *Chaffe vs. Farmer*, 34 An. 1021.

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Francis B. Hoffman, however, as appellant, is interested in seeing that the purchase of the property as made by him be sustained, inasmuch as he subsequently transferred the title so acquired by him to J. Caldwell Peirce under warranty.

We will have, therefore, to examine into and decide whether the adjudication made to Hoffman divested the heirs of Mrs. Peirce of their interest in the property.

We have already said that Hoffman's title was beyond attack on the ground of any bargain or arrangement between himself or Shattuck & Hoffman and J. Caldwell Peirce; that a judicial sale should be resorted to for the purpose of transferring the property over from the succession of the wife to the husband. The proceedings which resulted in the sale, therefore, have alone to be considered.

The only attack made upon the judicial proceedings is, that in foreclosing their mortgage the English and American Mortgage Company did so contradictorily with J. Caldwell Peirce as being tutor of his children when, as they contend, he was not such under the law.

If, at that time, Peirce was not their tutor, the company would have been entitled to call for the appointment of a tutor *ad hoc* to represent their interests under the proceedings then about to be taken. Art. 313 of the Civil Code declares that, "when the minor is without a tutor, any person who has a claim against him may apply to the competent judge to request that a tutor *ad hoc* be appointed to him, which tutor shall not be bound to give any security, but shall take an oath before the court who has appointed him to defend the interests of the minor according to the best of his knowledge." It will be seen from this article that in cases where parties have claims adverse to minors, their enforcement is not subordinated to the fact that at that time the general interests of the minors in the administration of their affairs should be protected by a tutor who had given bond, and otherwise complied with the law as to tutorship generally. The rights of creditors, as well as those of minors, was matter for consideration. The lawmaker, in dealing with that subject, deemed it perfectly consistent with proper protection of the minors that they should be represented defensively in litigation by parties whose fidelity was guaranteed simply by an oath to perform their duty. J. Caldwell Peirce would unquestionably have been the proper person to have

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been appointed tutor *ad hoc* to represent his children had they been at that time without a regular tutor. He would presumptively be much more concerned in and for the welfare of his children than would a stranger. When the English and American Mortgage Company, in an examination of the proceedings in the matter of the succession of the wife, found that the father had been tutor of the children under a recital that he had complied with the provisions of the law, and that he had taken an oath as tutor, they were justified in believing, particularly under the decision in *Stackhouse vs. Zuntz* (86 An. 583), that J. Caldwell Peirce was legally authorized to represent his children as tutor—if not generally as tutor, at least defensively, and for the purpose of that particular suit.

We think it would be subordinating substance to mere form to have required that the father should have been appointed as a tutor *ad hoc* in that particular case, and to take therein a second oath. We are of the opinion that the proceedings carried on contradictorily with him as tutor were legal, and carried with them the legality of the sale to Hoffman.

Even had there been a secret understanding between Hoffman and J. Caldwell Peirce, the intent and object of which was to transfer the ownership of property from the heirs of Mrs. Peirce to the father, we do not think that fact could be made by the children to turn to the injury of the plaintiffs. The record disclosed that their mother had executed a valid mortgage to the English and American Mortgage Company—that that company had validly enforced their mortgage rights on the property; that it had been purchased by Hoffman, against whose legal right to purchase nothing appeared; that it had been sold by Hoffman to Peirce, as between whom there was no reason to suppose that a legal disability existed either to sell or to buy. On the hypothesis that there was in fact some defect or vice in the title as between Hoffman, Peirce and Peirce's children, plaintiffs were no party to the proceedings or facts from which such defect arose. They knew nothing of such defect or vice. There was nothing to indicate such vice in the records. We can apply to them the language used in *Chaffe vs. Farmer*, 34 An. 1021, in respect to the intervenors in that case: "They acted in taking the mortgage upon the faith of a judicial sale translativ of the property. They were therefore in good faith and entitled to protection."

For the reasons herein assigned, it is hereby ordered, adjudged and

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decreed that the judgment herein appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the demands contained in the petition of intervention of Philip B. Peirce, Geraldine B. Peirce, wife of Samuel H. Coulsom; J. Caldwell Peirce, Jr., and Mary B. Pierce and contained in their petition in the suit of Philip B. Peirce *et al.* vs. J. Caldwell Peirce *et al.*, No. 1892 of the docket of the Eighth Judicial District Court for the parish of Concordia, to be recognized as the owners of the Delhi plantation in Concordia parish, and that the sales of said plantation made by the sheriff of said parish to Francis B. Hoffman on the 7th of May, 1887, and by Francis B. Hoffman to J. Caldwell Peirce on June 14, 1887, and the mortgages granted by said J. Caldwell Peirce to the American Freehold Land Mortgage Company of London, Limited, recorded in the mortgage books of the parish of Concordia be declared null and void and set aside, be and they are hereby rejected at their costs in both courts.

It is further ordered, adjudged and decreed that the injunction which issued herein on the petition of J. Caldwell Peirce be and the same is hereby set aside and the plaintiff, the American Freehold Land Mortgage Company of London, Limited, be and they are hereby authorized to proceed to seize and sell the property covered by their mortgage and referred to in their petition in accordance with the order of sale granted to them on their prayer. It is further ordered and decreed that J. Caldwell Peirce pay costs in both courts.

No. 12,196.

SOUTHERN INSURANCE COMPANY VS. BOARD OF ASSESSORS ET ALS.

The levying of taxes is for the "calendar years," and the "assessment" of property for the "purpose of levying" the "annual taxes" is likewise for the calendar year. So when the law provides that assessment is to be begun on the 2d of January and completed on the first day of March, it contemplates an assessment on the basis of the condition of things existing on the 1st of January. Home Insurance Company vs. Assessors, 48 An. 61, affirmed.

49	401
107	171
49	401
108	438
49	401
110	836
49	401
113	1063
113	1064

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Denègre, Blair & Denègre for Plaintiff, Appellee.

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Samuel L. Gilmore, City Attorney, and *James J. McLoughlin*, Assistant City Attorney, for Defendants, Appellants.

Argued and submitted February 4, 1897.

Opinion handed down February 15, 1897.

STATEMENT OF THE CASE.

The plaintiffs alleged that in making up the assessment rolls for the year 1895 the Board of Assessors for the parish of Orleans assessed them, under the head of "money in possession," etc., in the sum of ninety-five thousand nine hundred and thirty dollars, claiming to base said assessment upon their annual statement for the year 1894.

That said assessment was excessive and erroneous, and should not have been made; that in the above ninety-five thousand nine hundred and thirty dollars are included the amount of unadjusted losses due by plaintiffs outstanding at the date of the statement, all of which amount was paid in the early days of January or February, 1895, and ceased to exist before the assessment rolls were closed or completed, and could not and should not have been counted as assets of petitioners liable to taxation within the year 1895.

Petitioners averred that precisely the same issue had been determined in favor of petitioners against the defendants in suits brought by them in suits Nos. 35,994 and 44,087 of the Civil District Court, and the petitioners pleaded the judgments therein as *res judicata*. Petitioners prayed that they have judgment reducing the assessment from ninety-five thousand nine hundred and thirty dollars to fifty-nine thousand and twenty-six dollars, and that the State Tax Collector and the city of New Orleans be ordered to receive taxes for the year 1895 upon said amount of fifty-nine thousand and twenty-six dollars without interest.

The State Tax Collector and the city of New Orleans answered that the assessment complained of was lawful and correct, and should be maintained.

The District Court rendered judgment in favor of the plaintiffs, reducing the assessment to fifty-nine thousand and twenty-six dollars, and ordering the State Tax Collector and the city of New

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Orleans to receive from the plaintiffs taxes for the year 1895, upon said amount without interest or penalties, and ordered defendants to pay the costs of suit.

They appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. Counsel for plaintiffs urge in this court the exception of *res judicata* pleaded below, based upon the judgments in their favor in the suits Nos. 32,994 and 44,087 of the Civil District Court. They say that precisely the same issue was presented in those cases as is presented here, and that it was raised and decided between the same parties. The suits involved the assessments of 1891 and 1894. The judgments referred to not having been appealed from, fixed the rights of the parties as involved in that particular litigation. Their effect extended no further.

On the 29th of January, 1895, the plaintiff company made their assessment return to the Board of Assessors. In that return we find the following statement:

Money in possession on deposit or in hand	\$95,929
Less reserved for paid (payment of?) losses	86,908
	\$59,026

The assessors in making out their own assessment do not seem to have given the company credit for the thirty-six thousand nine hundred and three dollars which on their return list they had deducted from the ninety-five thousand nine hundred and twenty-nine dollars on hand, on the score that that amount was held by them in reserve fund for the payment of losses, but charged the plaintiffs as being assessable on the whole ninety-five thousand nine hundred and twenty-nine dollars, for we find that on the 11th of March, 1895, application was made to the board for a reduction to make their assessment conform to their list. This application was refused and this suit followed.

It is contended by the plaintiffs that the amount of thirty-six thousand nine hundred and three dollars which figured on their return as reserve fund for payment of losses was in point of fact paid out between the first of January, 1895, and the 11th of March, 1895; that the company never had on hand after the 11th of March even the amount of fifty-nine thousand and twenty-six dollars on which they were and are still willing to have their assessment based. They contend the evidence shows the following condition of affairs

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The company had on hand December 31, 1894	\$95,929
January 20, 1895, cash on hand	45,511
February 28, 1895, cash on hand	25,526
The amount of losses for the year 1894 paid out during the months of	
January, 1894, amounted to	40,742

Their position is thus stated in their brief: "We contend that the law contemplates the state of affairs existing or values existing on the first day of March of each year, the date upon which the rolls are completed, the assessment up to that time being inchoate, and that as it appears that on that day the company had but twenty-five thousand five hundred and twenty-six dollars and fifty-four cents cash on hand the application for a reduction to fifty-nine thousand and twenty-six dollars can not be contested, because actually a demand of less than the company were entitled to demand.

"From a statement of the issue thus presented to the court it is evident that they are not similar to those in *Home Insurance Company vs. Board of Assessors*, 48 An. 451, relied on by defendants in this case.

"Section 1 of the revenue act of 1890 declares as taxable all cash, without mentioning as of what date the cash is to be estimated.

"Section 24 of the act provides that the board shall meet on the 2d day of January, and complete their assessment by the 1st day of March of each year, and provides for daily meetings.

"The former acts provided a day upon which the valuation of cash was to be made. The revenue act of 1888 provided for the assessment of 'all cash on hand on the day upon which the notice is served to make return of taxable property, in conformity with this act' and provided that 'cash on hand' must represent the full amount standing in the name of the person to be assessed, or subject to his control on the day above mentioned. 'A change having been made in the law, it must be presumed it was done by design, and to establish a different rule, especially as the Act of 1890 is an amendment to the Act of 1888, and therefore clearly shows the intention of the Legislature to abolish the old and substitute a new rule for the valuation of cash on hand. Under these circumstances, we contend that the new rule fixes the date as of the day upon which the rolls are completed, since there is no assessment until on that date.

* * * If this be not the true rule, it is difficult to know what the true rule is. No other guide can be found, unless it be that as by Sec. 28 of the Act of 1890 corporations are called upon to make sworn returns within the first twenty days of January of each year,

it could be held that the condition of the company on the 21st of January is to be taken as the proper basis of assessment. * * *

It seems to us clear that our contention is correct, and that a consideration of the act shows that the assessment is made as of date the 1st of March; that the assessors are given the whole of January and February to gather information simply as a basis for their action upon that day." Counsel in argument, selected by way of illustration a number of special cases by which they sought to show the injustice or injury which would be done either to the State or to individual taxpayers by not adopting the theory advanced by them, but that is not a proper method of dealing with the subject. The assessment of property for the purpose of taxation and the levying of taxes upon the assessment of property has to be considered as a system and not, from a consideration of the results good or bad which may result therefrom in particular instances. Cases of individual hardship or inequality will result no matter what system may be adopted. What is necessary is that there should be some fixed rule established withdrawing from officials and from the taxpayers themselves a power of control over the performance of their duties. What might in some particular year under a fixed rule lead up to apparent hardship or injustice against the taxpayer, would the next, under the operation of the same rule, lead up to an apparent hardship or injustice to the State. The hardship or the benefits of a system will during a series of years doubtless be found to be equalized or compensated. We think the plaintiffs took a correct view of the law, when on the 29th of January they made a return showing the condition of the company's cash account, not as of that day, but as of the first of January, 1895. The "levying" of taxes is for "calendar years," and the "assessment" of property for the "purpose of levying" the "annual taxes" is likewise for the calendar year. That this is the correct rule is manifest from reading the Constitution itself and the various revenue laws levying taxes. If one citizen were to make his assessment on the 2d of January, another on the 10th of January, another on the 1st of February, another on the 15th of February, there would not be that uniformity as much demandable in matters of assessment as there is in the establishment of the rate of taxation. Plaintiffs concede that there should be some fixed date determining the rights of parties, but they contend that that date is fixed as of the 1st of March, when the assessments

are closed. We are not of that opinion. It is true that there is a period of time between the date when the business of assessment commences, and that upon which it is ordered to be closed, but that is because in the nature of things the assessors can not make the assessment over an extended territory in one day, and it is true that during that open period the taxpayer may make his return for assessment purposes, but when he does so he is expected to make it on the basis of the condition of things existing on the 1st of January. It is true that if there be "errors" in the assessment lists or in the assessment as made by the officials themselves, they are subject to correction, but a correction of "errors" is something different from an alteration of assessment. If the plaintiffs, after making their return, showing that they had on hand ninety-five thousand dollars on the 1st of January, had afterward discovered that they had on hand on that date only twenty thousand dollars, they could properly have applied for a "correction" of their list, but if having in fact on the 1st of January the amount they had stated they then held, they should apply to have the amount reduced, because, on the 1st of February, or some other day named, they had less than that ninety-five thousand dollars, they would seek, not a correction, but an alteration of their return. If plaintiffs' theory be true that the date that the assessment is ordered to close is to be taken as that fixing the date of the situation of individual taxpayers as to the objects on which they are taxable, and the valuation of the same, it is clear that what is intended to be the ending of the assessment, except for "corrective" purposes, would be practically the beginning of the assessment, for very naturally the situation of almost every taxpayer would have been more or less altered between the 2d of January, when the assessors are directed to commence their work, and the date when they close the same. It would be impossible for those officers in the short time allotted to them for the "correction" of the rolls to make a "revision" of the same through new lists not "corrected," but altered to conform to changed conditions.

Counsel refer us to Welty on Assessment, page 49, and the cases of Mygatt vs. Washburn, 15 N. Y. 320, and Clark vs. Norton, 49 N. Y. 243, but we find nothing therein which induces us to alter our views on the particular point presently submitted to us. There may be subordinate questions connected with the subject as to when

Succession of Heffner.

assessments are to be taken as beginning and ending the decision of which may be affected by viewing the situation of parties, and of property as of a date later than the 1st of January. We will postpone any expression upon them until particular cases arise making such expression necessary.

With reference to the present demand we are of the opinion that it is controlled by the decision in Home Insurance Co. vs. Board of Assessors, 48 An. 451.

For the reasons herein assigned, it is ordered that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that plaintiffs' demand be and the same is hereby rejected with costs of suit in both courts.

No. 12,389.

SUCCESSION OF WILLIAM HEFFNER.

1. Where an executor having made, as executor, payments of claims placed on his account, these charges were contested below, and the question is the correctness and legality of such payments, the executor has a direct official and personal interest in sustaining the payments, and he has a right to appeal from a judgment on such subject matter adverse to him.
2. Where one who has qualified as executor is brought into court in his official capacity to defend an attack upon the validity of the will which he is executing, he has a right to employ counsel to defend such suit, and the services of such counsel are properly chargeable to the estate.
3. Where a plaintiff, seeking to annul a will, has proceeded against the executor named in the will and the testamentary heirs and special legatees instituted therein, and has obtained judgment, setting aside the will with costs against all the defendants *in solido*, the executor who has paid these costs in full is entitled to charge them up in full against the succession in his account.
4. Payments made by an executor, without order of court, to special legatees under a will subsequently annulled, will not be recognized.
5. One ceases to be executor when the judgment annulling the will appointing him such becomes final.
6. If, from a scrutiny of the final account which a curator or executor has rendered on the demand of the heirs, he shall appear to owe a balance, he shall be sentenced to pay it to the heirs with interest from the day of judgment. (C. P. 1007.)

49	407
49	613
49	407
51	129
51	130
49	407
e117	549

49	407
123	510
e123	511

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

 Succession of Heffner.

Wise & Herndon for Executor, Appellant.

Harrison & Aston and *D. T. Land*, for Opponents, Appellees.

Argued and submitted January 20, 1897.

Opinion handed down February 15, 1897.

STATEMENT OF THE CASE.

William Heffner died in the parish of Caddo on the 20th day of February, 1895, having disposed of his property by what purported to be a last will and testament. The instrument was probated as such, and James Heffner, who was named therein as executor, qualified thereunder.

On September 14, 1895, Jackson Heffner *et al.* instituted a suit to annul the will, and to recover as legal heirs three-fourths of the estate. Service was made on James Heffner, individually and as executor. The suit resulted in the District Court in a judgment in favor of the plaintiffs, annulling the will and ordering them to be placed in possession of three-fourths of the estate. From that judgment James Heffner individually and as executor appealed. On appeal the judgment was affirmed. 48 An. 1088, Heffner *et als.* vs. Heffner *et als.* Jackson Heffner and the other plaintiffs in the suit to annul the will then ruled the executor to file an account. The executor filed his account.

In his petition accompanying the account the accountant averred that the succession of Wm. Heffner had been fully administered in accordance with the will, with the exception of the real estate which was still undisposed of, and the balance due the four sons of Jackson Heffner, amounting to one thousand dollars. He prayed that notice be given of the account, which he declared was his final act, and that he be discharged.

The account filed was as follows:

James Heffner, Executor, in Account with Succession of Wm. Heffner.

Real estate as shown by inventory.....	\$1,020 00
Notes as shown by inventory.....	8,850 07
Note on Sam Butterfield not inventoried ..	2,500 00
Cash on hand as shown by inventory.....	2,707 07
Total.....	\$13,847 07

Succession of Heffner.

OR.

Privileged Debts.

Funeral expenses	\$161 00
F. A. Leonard, notary's fees	
F. A. Leonard, clerk's fees in succession	
Clerk's fees in suit of Jackson Heffner <i>et al.</i> vs. James Heffner <i>et al.</i>	
To deposit in Supreme Court in suit of Jackson Heffner <i>et al.</i> vs. James Heffner <i>et al.</i>	20 00
To amount paid for brief in said suit	5 00
To R. J. Looney, attorney, for probating will	25 00
To Wise & Herndon, attorneys, for defending suits of Jackson Heffner <i>et al.</i> vs. James Heffner <i>et al.</i>	500 00

Amounts paid under terms of Will.

To amount paid Jackson Heffner's sons	1,000 00
" " " Mrs. Mary Wellborn	2, 21 51
" " " Ollie Akard	2,921 51
" " " Laura Booth	2,921 51

Jackson Heffner and his co-plaintiffs filed an original and an amended opposition to the account, setting up in the first opposition as grounds:

1. The executor failed to account for the interest on the notes set forth in his account and for the rents and revenues of the real estate belonging to said succession.

2. Because the debit side of said account foots up fourteen thousand eight hundred and sixty-seven dollars, and not thirteen thousand eight hundred and forty-seven dollars and seven cents as stated in the account.

3. Because the item of one hundred and sixty-one dollars funeral expenses and the item of twenty-five dollars fees for probating will are not due and owing by the succession.

4. Because the amount of the items of costs in succession and attorney's fees are not stated and are not due by said succession.

5. Because the amount of items of costs in suit of Heffner *et al.* vs. Heffner *et al.* are not stated and are not due by the succession and James Heffner has been condemned personally to pay said costs and as executor wrongfully and fraudulently disposed of eight thousand seven hundred and sixty-four dollars of the moneys and property of said succession, and because the defence of said suit was unnecessary and against the interest of said succession, as said executor well knew.

6. Because the item of five hundred dollars attorney's fees to Wise & Herndon for defending suit of Heffner *et al.* vs. Heffner *et al.* is not due and owing by said succession for the reason that Wise & Herndon were employed and represented James Heffner and the

Succession of Heffner.

other legatees individually, and the defence of said suit was unnecessary, against the interest of said succession and involved a pure question of law, with the authorities all in favor of the plaintiffs, as the said Wise & Herndon well knew; and further, because if said fees are due by said succession, which was denied, the same were exorbitant and excessive.

7. Because the executor was not entitled to a credit for the sum of one thousand dollars claimed to have been paid to Jackson Heffner's sons, and two thousand nine hundred and twenty-one dollars claimed to have been paid to Mary Wellborn—a like amount to Mrs. Akard, and a like amount to Mrs. Booth, because—

(1) Said sums were not paid out by the executor; (2) because if said sums were paid out by the executor they were made under the terms of a will which was an absolute nullity on its face; (3) because plaintiffs in the suit of Heffner vs. Heffner obtained a final judgment against James Heffner individually and as executor, and against the parties to whom said payments were claimed to have been made, recognizing them as the owners of three-fourths of the estate of Wm. Heffner, and ordering them to be put in possession of same, which said judgment they pleaded as *res judicata* on the question of the ownership and possession of said estate; (4) because prior to the pretended payments opponents made a demand on James Heffner, individually and as executor, for three-fourths of the estate, and pointed out to him the nullity of the will—that if the executor paid said sums to said parties he did so with full knowledge of the nullity of the will and of the rights of the opponents, and he had wrongfully and fraudulently disposed of eight thousand seven hundred and sixty-four dollars belonging to the succession. They prayed that their opposition be maintained, and that they have judgment against James Heffner individually and for three-fourths of the property and money of said estate not accounted for or disposed of by him, with ten per cent. per annum interest thereon and for general relief.

In the amended opposition they averred that James Heffner claimed to be owner of one-quarter of the property of the succession in his hands as executor, basing the same on the fact that he was one of the heirs at law of Wm. Heffner, and, as executor, he proposed to distribute the property in his hands in the proportion of one-fourth to himself, individually, and three-fourths to opponents. That they opposed said claim and said proposed distribution for the reasons:

Succession of Heffner.

1. That James Heffner, executor, was bound to account to opponents as owners for three-fourths of said estate, which he had failed to do, the property accounted for being less than one-half of the amount due to opponents. 2. That the executor had wrongfully and fraudulently disposed of a large amount of property belonging to said estate, as set forth in the original opposition filed, and had thereby rendered himself personally responsible to said succession and opponents, and was not entitled to receive any part of said succession as heir before he paid what he owed to the succession—his share as heir being compensated and extinguished *pro tanto* by the amount due by him to said succession. They prayed that in the event judgment be rendered in their favor against James Heffner, individually, that the amount of said judgment be declared compensated and extinguished *pro tanto* by the amount of the share of said James Heffner as heir of William Heffner in and to the property of said succession now in his hands as executor, and that said executor be ordered to deliver to opponents, as owners, within ten days from the adjournment of court the entire property of said succession now in his hands as executor, less all legal claims against the same that might be allowed by the court. They prayed for all other orders and decrees necessary in the premises.

The District Court rendered judgment increasing the amount of the debit side of the account by the sum of one thousand and twenty dollars, this being merely the correction of a clerical error in the statement. It sustained the items of one hundred and sixty-one dollars for funeral expenses, the item of twenty-five dollars for attorney fee for probating the will, and an amount of nine dollars and sixty-five cents for succession costs and notarial fees. It rejected the amounts of items of costs in the suit of Heffner vs. Heffner, and also the item of five hundred dollars for services rendered by Wise & Herndon as attorneys in defending the suit of Heffner vs. Heffner. It rejected the claim made by the executor for credit for amounts paid to Mrs. Mary Wellborn, Ollie Akard, Laura Booth and the four sons of Jackson Heffner as special legatees under the will. It decreed "that Jackson Heffner and his co-opponents do have and recover judgment against James Heffner individually, and as late executor of the succession of William Heffner, the full sum of ten thousand two hundred and thirty-eight dollars, being three-fourths of the balance (in his hands), with legal interest from date of judgment until paid. It further

 Succession of Heffner.

ordered and decreed that opponents be recognized as the legal owners of three-fourths of the real estate described in the inventory with the right to sue for a partition of the same and to demand in said proceeding the collation of what may be due them by James Heffner, the owners of the remaining one-fourth interest reserving their right to execute their judgment according to law.

The court at the same time sustained an opposition to the account which had been filed by Harrison & Aston claiming to have paid taxes due by the estate for such amounts and been subrogated to the rights of the State.

After said judgment was rendered James Heffner "individually" moved to set aside the judgment rendered against him for the reason that he individually was no party to said suit and made no appearance therein, and further, because said judgment was rendered in chambers without his knowledge or consent. The court overruled the motion, stating that under Act No. 72 of 1884 no motion in the nature of a new trial was permissible, as it was made the duty of the judge at the same time as reading the decree to grant the order of appeal—that the minutes would show that the judgment was rendered in chambers pursuant to consent of parties who were represented by their counsel. The motion to set aside the judgment for the reason that it was rendered at chambers without his consent was overruled.

Opponents moved to dismiss the appeal from that part of the judgment rejecting against said succession the claim of Wise & Herndon for attorney's fees, and rejecting claim for the costs of that suit, and from that part of the judgment condemning said executor personally in favor of opponents. Because said Wise & Herndon, and the parties to whom said costs are due, have not appealed, and the executor has no capacity to appeal in behalf of parties whom he has placed on his account as creditors, and whose claims have been opposed and rejected by the court.

2. Because James Heffner has furnished no bond personally,* but

*The bond furnished by James Heffner for an appeal reads: "We, James Heffner, executor Wm. Heffner estate, as principal, and S. B. Johnson as surety, are held and firmly bound unto the clerk of the First Judicial District Court in the sum of one hundred and fifty dollars," and declares the condition of the bond to be that "whereas the above bounden James Heffner, executor, has applied for and obtained an order for a devolutive appeal from the judgment lately rendered against him by the First Judicial District Court, for Caldo parish, in the case of the succession of Wm. Heffner, opposition to final account * * * now therefore, if the said James Heffner, executor, shall well and truly prosecute his said appeal, etc. * * * then this obligation to be null and void, otherwise to remain in full force and effect."

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solely as executor, and as executor can not appeal in his official capacity from a judgment against him personally.

ON THE MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

NICHOLLS, C. J. Appellant contends that he has paid the parties whose claims were opposed, and he is vitally interested himself in having their claims sustained. He calls our attention to the fact that the capacity in which he acted was as executor and not as administrator, and to the decision in the matter of the succession of Ames, 33 An. 1317, in which a distinction is drawn in respect to the questions raised in the motion as to his right of appeal between an executor and an administrator. He also directs our attention to the fact that, while the judgment is against him personally, it is also against him as executor.

This case does not present the question of the right of an administrator or executor, who has filed an account or tableau of proposed payments on which he has placed certain parties as creditors, to appeal in his official capacity from a judgment of the District Court rejecting the claims on an opposition made to the claims, as being really succession claims. We have decided a number of times that if the parties aggrieved by the decision do not themselves appeal, it is no part of the duty of the administrator or executor to champion their rights. In this case the executor has already made, as executor, payment of the claims which were contested below, and it is the legality and correctness of such payments made by him which were litigated below. Under that phase of the question the executor had a direct official, and also personal, interest in sustaining the payments if he could.

The second clause of the motion to dismiss refers, we presume, to that portion of the judgment appealed from by which opponents were decreed "to recover of James Heffner, individually and as late executor of the succession of William Heffner, the sum of ten thousand two hundred and thirty-eight dollars, being three-fourths of said balance (shown by the account filed), with legal interest from this date (date of judgment) until paid, and by which opponents were recognized as the legal owners of three-fourths of the real

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estate described in said inventory, with the right to sue for a partition of the same and to demand in such proceeding the collation of what might be due them by James Heffner, the owner of the remaining fourth, reserving, however, their right to execute this judgment according to law."

The judgment from which the executor has appealed was one rendered upon an opposition filed to his account as executor. It undertook to fix and determine the rights of the opponents to the funds in the hands of the executor, and to direct what disposition should be made by the executor. The executor had a direct official as well as personal interest in the subject matter of that judgment which carried with it a right to appeal from it. What issues can be legally raised and what legally passed on on this appeal, we can determine and declare after hearing. The motion to dismiss is overruled.

ON THE MERITS.

The first item opposed is the payment of five hundred dollars by the executor to the firm of Wise & Herndon for attorney's fees in defending the suit of Jackson Heffner *et al.* vs. James Heffner *et al.*, in which the plaintiffs successfully attacked the will of William Heffner and had it set aside.

It is claimed on behalf of opponents that the instrument offered and probated as the will of William Heffner was so manifestly defective as such that it was scarcely permissible to have attempted to defend it—that its nullity was apparent on its face and the attorneys employed really made no serious defence and their labor was practically nothing.

It is insisted that the suit of Jackson Heffner vs. James Heffner *et al.* to annul the will was brought by legal heirs representing three-fourths of the estate of William Heffner, against James Heffner, individually and as executor, and against all the legatees under the will either by actual citation or through a curator *ad hoc*, and that when the defendants in the case employed counsel and defended the will they did so in their own interests, and that the attorneys engaged should be paid by James Heffner and the legatees who were really their clients.

In *Sterlin's Executor vs. Gros*, 5 La. 100, it appears that one Philip Sterlin died leaving two instruments purporting to be his last

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will and testament. In one of these instruments a natural son was acknowledged as such and to him was bequeathed three-fourths of the estate. In the other one Celestin Gros was appointed executor, and that instrument having been probated, he qualified as such. The natural son brought suit to obtain possession of the estate, producing a copy of the notarial act which he declared upon as a will. He directed his proceedings against Gros as executor, attacking the will under which he had been appointed as a nullity on the ground that it was not legally witnessed.

The District Court annulled the will and its judgment was affirmed on appeal. A question was raised in the Supreme Court as to costs of suit. The court said: "The remaining question relates as to costs. Plaintiff contends that the estate should not be responsible for them, as the will was not that of the deceased. We think it ought. The costs were incurred in this case in consequence of the act of the testator and it was the duty of the executor to maintain the will."

In *Girard vs. Babineau*, 18 An. 604, the plaintiff, an attorney at law, brought suit to recover a fee for professional services rendered the succession of which defendant was the administrator. The court said the claim was advanced by the plaintiff, relying upon the ruling in the case of *Sterling vs. Gros*, and as part of the costs incurred by the testamentary executor in maintaining the will. The claim was rejected. The report of the case shows that the deceased, Marguerite Babineau, had left as a will an act under private signature, in which she bequeathed to one Narcisse De Blanc several slaves, and appointed him her testamentary executor. The plaintiff, acting as the attorney of De Blanc, filed a petition praying for the probating and homologation of the will and for letters testamentary. The heirs at law filed an opposition to the homologation of the will, alleging its nullity. Notwithstanding the opposition, De Blanc, claiming to be executor under the will, filed a petition for an inventory, and afterward another for the sale of the property.

The heirs at law then instituted a direct action against the legatees under the will to have the same set aside. In that action De Blanc was not sued in his capacity as testamentary executor, but as one of the legatees. Plaintiff (*Girard*) filed an answer for De Blanc; other attorneys appeared for the different legatees, and thus issue was joined between the heirs and legatees. The will

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seems to have been set aside. In its opinion the court said: "From the moment all the legatees appeared in court and filed their answers to the direct action brought against them to annul the will, the *contestatio litis* was between them and the heirs, and not between the latter and the testamentary executor. After the filing of the opposition to the probating of the will the testamentary executor had no authority to employ counsel to ask for a sale of the property."

The court allowed, however, as costs, seventy-five dollars for petition for probate of the will and ten dollars for the inventory, which was declared to be a conservatory act for the benefit of both the heirs and the legatees.

It does not appear from the opinion that the will ever went to probate.

In Succession of Hasley, 27 An. 587, it appeared that David Hasley, the deceased, left a will, by which he gave the usufruct of all his property to his widow during her life, and appointed her his executrix. The will was probated, and Mrs. Hasley was confirmed as testamentary executrix. The heirs of Hasley then sued to have the will annulled, and by a judgment of the Supreme Court the will was held to be valid. The heirs then sued to reduce the legacy to the disposable portion and for the rendition of an account and a partition. There was judgment reducing the disposition in the will and ordering an account. An account was filed and various oppositions were made among these was one against the fee for defending the suit in which the validity of the will was attacked; also the fee for defending the suit to reduce the legacy to the disposable portion and for an account. The former of these two oppositions was rejected, the court holding it was properly chargeable to the estate. In sustaining the second opposition, the court said: "The testator having left no forced heirs, the executrix might have learned from any member of the bar that the bequest of the usufruct of the whole of his property was reducible, and there was no necessity for defending such a suit—at least, by the executrix. If the legatee chose to defend it, she should pay a reasonable fee; it was not a proper charge against the estate."

In the present succession (that of William Heffner) the will of the deceased was actually probated, and the executor named therein actually qualified. The plaintiffs in the suit of Jackson Heffner *et al.* vs. James Heffner *et al.* brought him into court in his official capacity

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as a defendant. As such he resisted, both in the District and Supreme Courts, the claims of the plaintiffs. Plaintiffs, it is true, made all the legatees, among whom the executor himself was one, parties to the action, but the fact remained that the executor was officially a defendant on plaintiff's demand. It was proper for him, as such, to employ counsel and defend the suit. He employed Messrs. Wise & Herndon—that firm seems to have been employed by all the parties defendant, not solely by the executor, as in the pleadings they appear and act for all. We are of the opinion that accountant is entitled to a credit for three hundred dollars for and on account of the fee of Messrs. Wise & Herndon.

The second item opposed is the charge made against the estate by the executor for costs paid by him in the defence of the suit of Jackson Heffner vs. James Heffner, Executor, *et al.*

Opponents claim that the judgment of this court in that suit on appeal definitively settled that question adversely to the right of reimbursement claimed by the executor. Our judgment was: "The judgment of the lower court is affirmed with costs." The judgment affirmed condemned the defendants in that case *in solido* to pay the costs; the defendants were James Heffner, individually and as executor, and the various persons named as legatees in the will. The judgment relieved the plaintiffs in that case, as such, from the responsibility for costs, and authorized them to charge the estate itself with any amounts paid out by them for that purpose. It, however, charged the estate represented by James Heffner to pay solidarily with James Heffner individually, and the other legatees who were defendants in the suit, the costs of suit. Parties holding claims for costs were entitled to recover from the executor, as well as from the other parties, and if, in point of fact, the executor paid the accounts he is entitled to credit for the same. Opponents who, as plaintiffs, were entitled to reimbursement for amounts paid out by them for costs primarily, and who, as plaintiffs, were relieved from any direct liability to the executor for unpaid costs paid out by him, have indirectly, as heirs at law, to take their share in the succession, lessened by the amounts of the costs paid by the executor. James Heffner, individually, will have, indirectly, to pay his share of the costs as an heir.

Opponents, as plaintiffs in the suit of Jackson Heffner *et al.* vs. James Heffner, Executor, *et al.*, considered the executor as the

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proper and necessary party against whom they should proceed in their attack upon the will, and accordingly brought him into court as such. *Ex industria* they made James Heffner individually, and the various parties who were made legatees under the will, parties defendant, and recovered judgment against them as well as against the succession for costs. Opponents have the right, as plaintiffs in that suit, to enforce their judgment against all the defendants therein; but we do not think their judgment can be set up in this suit against the credit claimed by the executor for payments made by him as such under decree of the court. It may be well to say that the increased cost incurred by reason of the fact that the legatees were individually made parties defendant in the suit was almost nominal. Those parties, with the exception of James Heffner, were not heirs at law and they are not before the court, and it would be difficult to know what their respective *pro rata* of costs would be. We think the credit which the executor claims for costs in the suit mentioned is a proper credit and should be allowed. *Sterlin's Executor vs. Gros*, 5 La. 105; *Girard vs. Babineau*, 18 An. 604; *Succession of Hasley*, 27 An. 590; *Chapoton vs. Creditors*, 46 An. 415.

The next item opposed was a claim advanced by the executor to be credited with one thousand dollars paid to Jackson Heffner's sons—two thousand nine hundred and twenty-one dollars and fifty-one cents to Mrs. Mary Wellborn—a like amount paid to Mrs. Ollie Akard and a like amount paid to Mrs. Laura Booth.

We think the District Court ruled correctly in rejecting these claims. The parties to whom payment was made were named special legatees in the will which was annulled. The payments were made without order of court and at the executor's peril.

The executor complains of that portion of the judgment by which opponents are decreed to recover against himself individually and as executor "the sum of ten thousand two hundred thirty-eight dollars and fifty-six cents as being three-fourths of the balance in the hands of the executor with interest, and further recognizing them as owners of three-fourths of the real estate described in the inventory, with the right to sue for a partition of the same, and to demand in said proceeding the collation of what sum may be due them by James Heffner, the owner of the remaining fourth, reserving their right to execute their judgment." He contends that though he consented that the decree in the case should be rendered (as it was) at

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chambers under Act 72 of 1874, his consent was given only in his official capacity as executor, and he was not before the court individually. That the decree rendered was one homologating an account of executorship which could not be rendered in vacation or at chambers; citing in support of this position Succession of Bougère, 29 An. 378, 381.

He also contends that he was before the court only as an executor rendering an account—that he was not individually and personally responsible to opponents for any amount which might be coming to them as heirs in the succession and could not be condemned to pay the same. That Art. 993 of the Code of Practice and the decisions of this court in Dupuy vs. Dashiell, 16 La. 126; Wells vs. Roach, 10 An. 343; Stevens vs. Stevens, 13 An. 416; Succession of Philbrick, 18 An. 220; Succession of Comstock, 44 An. 429, shows the circumstances under which an executor may become personally liable.

At the time the account which is opposed was filed, James Heffner was no longer executor of the succession of his brother. He ceased to be such when the judgment annulling the will became final; when the plaintiffs in that suit afterward went into the succession of Wm. Heffner in the District Court for Caddo and ruled James Heffner as executor to file his account, and in obedience to orders of court the account was filed, it was that of one, not who was, but who had been the executor of an estate. The plaintiffs none the less treated him as an executor, and so dealt with him, bringing him into court by rule and objecting to the account by oppositions. Heffner, personally, was not before the court. Opponents are mistaken in their amended opposition in stating that accountant proposed in his account to make a distribution of the assets of the succession—three-fourths to opponents and one-fourth to himself. He simply made a statement showing the assets of the succession in his hands on one side and the credits to which he claimed he was entitled on the other, without any intimation or claim as to how the assets should be distributed. In the suit of Jackson Heffner vs. James Heffner the present opponents had, as plaintiffs, been contradictorily with James Heffner individually and as executor recognized and decreed to be the legal heirs of William Heffner and entitled as such to three-fourths of his succession, and they had in the same judgment succeeded in obtaining a judgment that they be placed in possession. That judgment became final long ago independ-

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ently of any judgment of court rendered upon the opposition filed in the present proceedings. When the plaintiffs in that suit ruled James Heffner, as executor, into court, they did so with their recognized status as heirs to three-fourths of the estate and with an existing decree in their favor that they be placed in possession. The matter before the court through the account was the ascertainment of what the succession in his hands really consisted of for purposes of distribution. Accountant when he filed his account averred that it was a final account, stated that the succession was fully administered and that the only asset of the succession not in money in his hands was the real estate which still remained unsold.

When the lower court after the account was filed and the oppositions had been made and tried, rendered the decree it did, matters were substantially in the situation called for by Arts. 1000, 1001, 1002, 1003, 1004, 1005, 1006 and 1007 of the Code of Practice, with the sole exception that the proceedings commenced with a rule instead of a petition and that movers in rule were already recognized as heirs and then held a judgment ordering them to be put in possession of three-fourths of the estate. Accountant made no objection on the score of the manner in which he was called into court, but rendered an account as directed.

What are the provisions of Art. 1007 of the Code of Practice in relation to the judgment proper to be rendered on the homologation of the final account? The article declares that "if from a scrutiny of the account, the curator or executor shall appear to owe a balance he shall be sentenced to pay it to the heirs or other claimants, with interest, from the day of judgment."

Article 1057 of the Code of Practice declares that "if the curator, testamentary executor or administrator refuses or neglects to pay the amount for which judgment has been rendered in one of the modes pointed out in the preceding articles, or if he fails to prove that he has no funds in his hands, the party in whose favor the judgment was rendered may take out execution against him, under which his property to a sufficient amount to pay debt shall be seized."

Appellant seems to apprehend that the judgment rendered in the present suit means something other and different from that which is contemplated in Art. 1056 of the Code of Practice. We do not so understand it. If the parties holding the judgment were to place a wrong construction upon its scope and effect and proceed to enforce

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it in an unauthorized manner the judgment debtor would have his remedy, but we can not by anticipation suppose that such a thing will happen or that because a correct judgment may be misinterpreted in execution, it should be set aside.

Accountant does not pretend to have any claims against the succession or against his co-heirs—he does not pretend that their rights as heirs are subject to deduction from any cause or that there is anything requiring a partition. As we understand matters the opponents in this case constitute with accountant himself all the legal heirs of the deceased. Accountant has in his hands a certain sum of money which calls for a division or a distribution rather than a partition. *Rachal vs. Rachal's Heirs*, 10 La. 458.

We see no reason why opponents should not to the extent of their recognized rights receive present payment. It will be practically a provisional partition of funds to be followed by a definitive partition when the real estate is disposed of. Opponents are entitled to be paid presently three-fourths of the balance of the "funds" on hand after accountant shall have received the credits to which he is entitled, with legal interest from date of judgment of the District Court until paid, costs of both courts payable out of the succession funds.

We restate the account as follows:

DEBITS.

Real estate as shown by inventory.....	\$1,020 00
Notes inventoried.....	8,840 07
Note Sam Sutterfield (not inventoried).....	2,800 00
Cash on hand as shown by inventory.....	2,707 07
Total to be accounted for.....	\$14,867 14

CREDITS.

Real estate remaining on hand.....	\$1,020 00
Funeral expenses and doctor's bill.....	161 00
E. J. Looney, attorney's fee.....	25 00
F. A. Leonard.....	9 65
Transcript in suit of Heffner vs. Heffner.....	82 00
Wise & Herndon, attorney's fees.....	800 00
Amount paid for brief.....	5 00
Deposit in Supreme Court.....	20 00
Total credits.....	\$1,872 65

RECAPITULATION.

Debits.....	\$14,867 14
Credits.....	1,872 65
Balance.....	\$18,294 49
Three-quarters of balance.....	\$9,970 86

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For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby amended by reducing the amount for which judgment was rendered in favor of opponents, against James Heffner as executor, from ten thousand two hundred and thirty-eight dollars to nine thousand nine hundred and seventy dollars and eighty-six and two-thirds cents, with legal interest thereon from date of judgment of the District Court, and, as so amended, the judgment appealed from be affirmed; costs of both courts to be paid out of the succession funds.

No. 12,809.

CITIZENS AND TAXPAYERS OF DE SOTO PARISH VS. GOODE B. WILLIAMS, PRESIDENT POLICE JURY, ET ALS.

The provisions of Arts. 209 and 242 of the Constitution being upon the same subject matter, the increase of *ad valorem* taxation upon property within the parishes and municipalities of the State, same are laws *in part materia* and must be construed together.

What is meant by the phrase "by a vote of the majority of the property taxpayers in number and in value" occurring in Art. 242, is a majority of the property taxpayers actually present and voting at an election.

All qualified property taxpayers who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

Scarborough & Carver for Plaintiffs, Appellees.

Alexander & Blanchard (Wm. Goss of Counsel) for Defendants, Appellants.

Argued and submitted January 19, 1897.

Opinion handed down February 15, 1897.

Rehearing refused March 15, 1897.

The opinion of the court was delivered by

WATKINS, J. About twenty alleged citizens and taxpayers of the

49	422
52	474
49	422
108	539
49	422
112	905
49	422
116	431
49	422
123	69
126	729

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parish of De Soto entered suit against the Kansas City, Shreveport & Gulf Railroad Company, the president of the police jury of that parish, and the board of supervisors thereof, and demanded that the ordinance of said police jury directing an election to be held for the purpose of taking a vote on the question of levying a special tax of five mills upon the assessed valuation of all property within said parish, for the use and benefit of said railroad company, and the declaration of the result of the election as being in favor of the tax by said board of supervisors, be declared null and void; and the prayer of their petition is that the court declare and decree that the aforesaid election, which was held on the 2d of December, 1895, did not result in favor of the tax, and that they be relieved from all obligations and burdens resulting therefrom.

After answer filed and trial had there was judgment in favor of the plaintiffs in conformity to the allegations and prayer of their petition, and after a motion for a new trial was made and overruled, the defendants prosecuted this appeal.

The several grounds upon which plaintiffs rest their claims to relief are, substantially, as follows, viz.:

First—That the said election was erroneously ordered, for the reason that the petition therefor was not signed by one-third of the property taxpayers of the parish.

Second—That the said election was illegal for the reason that the petition therefor requested that the proposition for the levy of the tax be submitted to the property taxpayers of the parish, whereas the police jury ordinance required that it be "submitted to the property taxpayers of the parish who are entitled to vote under the laws of the State;" and the ordinance was illegal and void, by reason of its incompatibility with the petition of the taxpayers upon which it was predicated, and of the fact, that "there was no law at the time in existence which authorized the police jury to submit a question of levying a special tax in aid of a railway, to only such taxpayers as were entitled to vote under the general election laws of the State," etc.

Third—That said election was not carried in favor of the tax, for the reason that no legal ballots were cast for the tax, same not conforming to the form of ballots prescribed by the ordinance.

Fourth—That the tax was not voted for by a majority in number

and value of the property taxpayers of the parish, in conformity with the requirements of Art. 242 of the Constitution.

With the exception of the third, all the grounds assigned for annulling the ordinance of the police jury calling the election, the proclamation of the result of the election by the board of supervisors, and the ordinance of the police jury levying the tax, are substantially the same; and they proceed upon the theory that the proposition for the levy of the tax was not submitted to the property taxpayers of the parish, but only to those entitled to vote under the election laws of the State.

It must be observed at the outstart of this inquiry, first, that the plaintiffs make no contention as to the qualifications of the persons who voted for or against the tax; second, none that any persons who offered to vote were refused the right of voting; third, and none as to the method of holding the election, or of the manner in which proclamation of the result thereof was made.

Also, that there is no claim made with regard to the right of aliens, or non-residents, to have participated in the election; and no claim is made to *rest upon any statute* of the State—the plaintiff's theory resting exclusively upon an interpretation of Art. 242 of the Constitution.

The District Judge, in disposing of the objection which relates to the form of the ballots that were cast in favor of the tax, said: "There is no difference between the ballot prescribed and that used;" and our examination of the evidence has satisfied us of the correctness of his conclusion.

The crucial question in the case was disposed of by the District Judge very tersely, in the disposition he made of the plaintiffs' second and fifth propositions, which was subsequently elaborated and enlarged, in the course of his reasons for judgment and analysis of authority.

In that of the second, he said:

"This objection loses its force and pith, for the reason that the right to vote was not confined to those taxpayers alone who are authorized to vote under the 'election laws' of Louisiana, but extended the right to all taxpayers who are entitled to vote under 'the laws' of Louisiana," etc.

In that of the fifth, he said—quoting it as follows, viz.: "That the tax was not voted for by a majority in number and value of the

property taxpayers of the parish, as required by Art. 242 of the Constitution of the State, and that the tax was therefore not carried"—the evidence shows that at the date of the election there were two thousand four hundred and seven male resident taxpayers in the parish, with an assessment of eight hundred and eighty-three thousand six hundred and seventy-five dollars; and that of this number one thousand and sixty-nine, with an assessment of four hundred and thirty-eight thousand four hundred and forty-eight dollars, voted for the tax, while six hundred and thirty-eight, with an assessment of three hundred and forty thousand five hundred and ninety-eight dollars, voted against the tax.

"It will thus be seen that the tax received a majority in number and amount of the votes cast, but did not receive a majority either in number or amount of the *whole number of resident male taxpayers*; though a majority both in number and amount of such resident male voters participated in the election."

Discarding, altogether, the interpretation of like questions by the courts of many of the States, and of the Supreme Court of the United States, and holding "that this case must be decided by the aid of our own constitutional provisions, in the light of our own jurisprudence," the judge *a quo* said:

"It is true that Art. 242 does not say, in so many words, that it shall require a majority of *all*, whether voting or not, to carry such a tax; and if the article stood alone, and there was no other article authorizing an increase of taxation for any other purpose, the conclusion might be different. But when we find an express provision in the only other article authorizing an increase of taxation by a vote, that a majority of those voting shall be sufficient, and find no similar words in Art. 242, the conclusion seems inevitable that the omission was intentional, especially when we find it coupled with so many other restrictions in Art. 242 that are not in 209."

In arriving at this conclusion the judge *a quo* appears to have given due attention to all the adjudications of this court upon the subject, and he collated them as follows, viz.: *Surget vs. Ohase*, 33 An. 833; *Duperier vs. Viator et al.*, 35 An. 957; *MacKenzie vs. Wooley*, 39 An. 944; *Sentell et als. vs. Police Jury*, 48 An. 96—analyzing only the last two; but his analysis of the two articles of the Constitution, taking them in conjunction, is very persuasive, though we can not concur in his conclusion.

Without going into details, or traversing the answer of the defendants *in extenso*, we make from the principal brief of their counsel, the following extract, as fairly stating the contention on which they rely, namely:

“‘A vote of the majority,’ as used in Art. 242, instead of meaning that a majority of all the property taxpayers in numbers and in value in the parish must vote *affirmatively* for the proposition, means that the *vote given* as a whole must be considered, and if it be found that a majority of such vote is in favor of the tax, then it is carried, otherwise not. How can those who, by abstention from the polls, *do not act* on the proposition, be held to be included in ‘a vote?’ They can not be. The phrase ‘a vote,’ as used in the article, is synonymous with ‘a poll’—a poll of the property taxpayers of the parish—and if a majority in numbers and in value of such ‘poll’ be found voting for the tax it is carried. This view not only makes the article practical and effective, but reconciles it with its sister Art. 209, relating to the same subject matter—an increase of taxation, over the general limit, for the purpose of public improvements. Webster defines ‘a poll,’ in this sense, to be ‘a number or aggregate of heads; a list or register of heads or individuals;’ also ‘the register of the names of electors who may vote in an election.’ Therefore, ‘a poll,’ ‘a vote,’ includes all who actually cast their votes at the election. Those who stay away are not to be counted in the poll—in the vote.”

The facts are few, simple and uncontested.

They are, in substance, as follows, viz.:

At the request of the Kansas City, Shreveport & Gulf Railroad Company, one of the defendants, a special tax was solicited at the hands of the people of the parish of De Soto, to be laid upon the taxable values thereof in aid of the construction of a railroad track through said parish *en route* from Kansas City to the Gulf of Mexico.

Upon petition duly signed as the law requires the question was duly submitted to the property taxpayers of the parish at an election held conformably to law, and with the result, substantially, as stated in the reasons assigned by the District Judge.

After the votes cast had been duly counted and tabulated by the board of election supervisors, another of the defendants, proclamation of the result was made as authorizing the tax.

Thereupon the police jury, another of the defendants, passed an ordinance levying the special five-mill tax voted at the election.

In furtherance of its enterprise the railroad company proceeded to construct its line of railway through the parish of De Soto, as originally contemplated; and, at great expense, had already constructed and completely equipped and outfitted same for many miles, relying upon the avails of said tax, and the laws and jurisprudence of the State interpreting them as they existed at the time.

And, in fine, while the road was in process of construction and the tax in process of collection, this suit was brought for the annulment of the latter.

It is from the standpoint of the aforesaid pleadings, proof and opinion we are invited to review the judgment appealed from.

While the argument at the bar and in the briefs of counsel, on either side, are very elaborate, and more than usually able and instructive to the court, yet, in our conception, the question for decision is narrowed to the compass of the single phrase of Art. 242 of the Constitution, viz.: "By a vote of the majority of the property taxpayers in numbers and in value."

And in determining the true meaning and import of that phrase, we must decide whether a majority of those voting is intended, or a majority of *all* the property taxpayers, regardless of whether they participated in the election by voting thereat or not.

And just here it must be observed that in the discussion of the case, and in the opinion of our learned brother of the District Court, property taxpayers of the parish of De Soto were alone dealt with.

Inasmuch as this constitutional article is not self-explanatory on this subject, we are constrained to do as the District Judge has done and consult other articles of the organic law upon the same subject matter—*increase in the rate of property taxation for public improvement*—as well as the jurisprudence applicable thereto, in order to reach a satisfactory solution of the query propounded.

Pursuing this course, we will, in the first place, deal with Arts. 209 and 242, as *in pari materia*; and in the second place with the latter alone.

I.

The following are the two articles—namely, 209 and 242.

That portion of Art. 209 which relates to the question involved in this case reads as follows:

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"No parish or municipal tax, for all purposes whatsoever, shall exceed ten mills on the dollar of valuation; provided, that for the purpose of erecting and constructing public buildings, bridges and works of public improvement in parishes and municipalities the rates of taxation herein limited may be increased when the rate of such increase, and the purpose for which it is intended, shall have been submitted to a vote of the property taxpayers of such parish or municipality entitled to a vote under the election laws of the State, and a majority of same voting at such election shall have voted therefor."

Article 242 reads as follows:

"The General Assembly shall have power to enact general laws authorizing the parochial or municipal authorities of the State, under certain circumstances, by a vote of the majority of the property taxpayers in numbers and in value, to levy special taxes in aid of public improvements or railway enterprises; *provided*, that such tax shall not exceed the rate of five mills per annum, nor extend for a longer period than ten years."

A careful scrutiny of these articles makes it apparent that both appertain to the same subject matter, the increase of parish or municipal taxation beyond the fixed limit of ten mills. Art. 209, occurring under the heading in the Constitution entitled "Revenue and Taxation," lays down the *general prohibition* that "no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation;" and the subjoined *proviso* states the exceptions thereto, enumerates the character of objects in aid of which the foregoing limitation may be increased and the *modus operandi* of increasing such parochial or municipal tax.

Article 242, occurring under the heading in the Constitution entitled "Corporation and Corporate Rights," contains a general direction to the General Assembly upon the subject of special taxes, and confers upon them "power to enact general laws authorizing the parochial or municipal *authorities* of the State, *under certain circumstances*, to levy special taxes in aid of public improvements or railway enterprises." (Our italics.)

This last article deals with the General Assembly alone, and authorizes them to deal with "parochial and municipal *authorities under certain circumstances*;" and in keeping with this delegation of authority it confers upon the General Assembly "power to enact general laws"

with reference to "special taxes in aid of public improvements or railway enterprises."

It is not denied, on the contrary it is admitted, that the provisions of Art. 209 must be consulted for the purpose of ascertaining the true meaning and import of the phrase "*under certain circumstances*," occurring in Art. 242, or in other words, the article conferred power upon the General Assembly to enact laws upon the subject of special taxes *under the circumstances enumerated in Art. 209, which contains the prohibition above referred to.*

And manifestly this is the only correct view to be taken of it, as any other would do away with all constitutional restraint upon the General Assembly in the premises and open the door for the enactment of *any* laws they might deem expedient.

Not only so, but the two articles are, to our thinking, harmonious upon another vital question, the objects for which the rate of taxation may be increased—the phrase in Art. 209 being "for the purpose of erecting and constructing public buildings, bridges and *works of public improvement*," while that in Art. 242 is "in aid of *public improvements, or railway enterprises.*"

It will not be denied that public buildings and bridges are "public improvements" in the sense of Art. 242, nor will it be denied that a railroad, such as the one of the defendant railway company, is a "work of public improvement" in the sense of Art. 209.

In the two articles of the Constitution succeeding 242 we find the following expressions, namely:

(1) "Any railroad corporation, or association organized for the purpose, shall have the right to construct and operate a railroad between any points within this State, etc., Art. 243; (2) "railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers." Article 244.

And our statute provides that "it shall be lawful for any number of persons not less than six * * * to form themselves into and constitute a corporation for the following purposes, to-wit: For the construction and maintenance of *railroads, canals, plank roads, bridges, ferries and other works of public improvement.*" R. S., Sec. 683.

It is thus established upon the authority of the Constitution and the statutes of this State, that the term "railway enterprises" occur-

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ring in Art. 242, as well as "bridges," occurring in Art. 209, are "works of public improvement," in the sense of the latter.

The differences between the two articles are the following, namely, that Art. 209 provides that the proposed increase of the rate of taxation shall be "submitted to a vote of the property taxpayers of *such parish*," while 242 provides that same shall be authorized "by a vote of the majority of the property taxpayers *in numbers and in value*," omitting the *parish*; and that Art. 209 provides that the property taxpayers shall be those only who are "entitled to vote under the election laws of the State, and a majority of same voting at such election shall have voted therefor," while Art. 242 is silent on the subject.

Attention has been attracted to the fact that while Art. 209 places no limitation upon the rate of the proposed increase, yet Art. 242 fixes the rate of increase at five mills, and the period of its duration at ten years.

Taking the latter supposed difference first, it can, in our opinion, be readily reconciled, upon the hypothesis already suggested, that Art. 242 was a grant of power to the General Assembly to deal with the subject of special taxes, and that power is subject to the limitation contained in the *proviso*.

That *proviso* affording a check upon the General Assembly, it is powerless, "under (*any*) circumstances," to pass the limit therein set.

Considering, in the second place, the other supposed difference, we find it distinctly covered by a decision of our predecessors; we refer to the case of *Surgett vs. Chase*, 33 An. 833, wherein the question was of the legality of a special tax for the purpose of building a public levee, which had been "submitted to a vote of the property taxpayers" in supposed conformity to the provisions of Art. 209, omitting the limitation of Art. 242 "in numbers and in value."

In that case the court, in its original opinion, said:

"It requires no reasoning, or authority to satisfy the legal mind, that any legislation which would have attempted to confer on police juries the power to build public levees * * * would be glaringly unconstitutional, and could not be enforced by the courts unless the authority be found in Arts. 209 or 242. * * *

"Construing these two articles in connection with Art. 215," etc., the court announced that the foregoing conclusion was confirmed.

Following up that theory the court quoted Art. 242 in its entirety and made the following observations thereon, viz.:

"Now, as the project of levying this special tax is shown to have been submitted to the majority of the taxpaying electors of the parish, and not to the majority of the taxpayers of the parish *in numbers and in value* as imperatively required by that article * * * defendants can not invoke the authority of that article."

In other words, the court held that the defendants had submitted the question of levying the special levee tax to the majority of the taxpaying electors in keeping with the provisions of Art. 209, but had failed to procure "a vote of the majority of the property taxpayers in numbers and in value," as provided in Art. 242.

That this was the evident purpose and intended scope of that opinion is fully verified by the opinion on rehearing, wherein MR. JUSTICE FENNER, speaking for the court, said:

"The proposition that Art. 209 is self-operating, and confers directly upon the parishes the absolute power to levy *unlimited* taxes for the purpose therein specified upon the vote of a mere numerical majority of the taxpayers, without reference to the value of the property represented, is certainly startling."

It is rarely the case that so much force and meaning are couched in such few words.

But for the construction the court placed upon the provisions of Art. 209, the consequences apprehended would inevitably flow from it.

If Art. 209 is *not* self-operating it is because Art. 242 confers upon the General Assembly the power to put it in force. If Art. 209 does *not* authorize unlimited taxes for the purposes specified therein, it is because the *proviso* of Art. 242 prevents.

If Art. 209 does not authorize a mere numerical majority of the property taxpayers, without regard to their number or value of property represented, it is because the restraint is imposed by Art. 242.

On the other hand, if only those property taxpayers of a designated parish, who are entitled to vote under the election laws of the State, are entitled to participate in an election held in pursuance of Art. 242, it is because *that* condition is imposed by Art. 209.

To our minds, the force of the conclusions the court arrived at in that case is irresistible; and we accept them as absolutely conclusive on the proposition that Arts. 209 and 242 are laws *in pari materia*.

Accepting this conclusion as correct, it necessarily follows that the

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concluding sentence of Art. 209 controls this case, viz.: "And a majority of the same voting at such election shall have voted therefor."

But that opinion is not alone. There are others.

In *Duperier vs. Viator*, 35 An. 957, the contention was "that the majority of the taxpayers of the parish did not vote in favor of the tax as required by Act 126 of 1882;" but, notwithstanding the proof disclosed that a number less than a majority of the property holders participated in the election, the court said:

"In our opinion, this language"—that of Art. 209, quoting same—"is liable to no other construction (than) that the tax must receive the vote of the majority of the taxpayers *who voted at the election*; or, in other words, the *majority of the legal votes cast at the election*," etc.

That decision goes further than the exigencies of the instant case require, for the reason that at the election under consideration there was a large majority of the property taxpayers, in numbers and in value, who participated in the election; and a large majority of those participating voted in favor of the tax.

In *McKenzie vs. Tax Collector*, 39 An. 944, the court had under consideration the identical question we have before us—the legality of a special municipal tax, which had been levied in pursuance of an election held in 1887, in aid of the construction of a railroad connecting the town of Minden with the main line of the Vicksburg, Shreveport & Pacific Railroad, passing through a portion of the parish of Webster.

In dealing with the question the court said:

"Articles 242 and 209 being *in pari materia* (they) must be construed together; and the latter provides that the levying of a special tax shall be submitted to a vote of the property taxpayers of such parish or municipality entitled to vote under the election laws of the State.

"In *Duperier vs. Viator*, 35 An. 957, this court held that the property taxpayers entitled to vote are only those who are entitled to vote at a general election."

This case is in exact keeping with that of *Surget vs. Chase and Duperier vs. Viator*.

In 1884 there was submitted to the electors of the State the subjoined amendment to Art. 214 of the Constitution, namely:

"No. 112.

JOINT RESOLUTION.

"Be it resolved, by the General Assembly of Louisiana, two-thirds of the members elected to each house agreeing thereto, That at the general election next ensuing the passage of this resolution, the following amendment to Art. 214 of the Constitution of this State shall be submitted to the people of this State, and if a majority of voters at said election shall approve and ratify such amendment, the same shall become a part of the Constitution of the State, to-wit: That Art. (214) two hundred and fourteen of the Constitution be amended so as to read as follows:

"The General Assembly may divide the State into levee districts and provide for the appointment or election of levee commissioners in said districts, who shall, in the method and manner to be provided by law, have supervision of the erection, repair and maintenance of the levees in said districts; to that effect the Levee Commissioners may levy a tax not to exceed ten mills on the taxable property situated within the alluvial portions of said district subject to overflow; provided, that in case of necessity to raise additional funds for constructing, preserving or repairing any levees protecting the lands of a district, the rate of taxation herein limited may be increased, when the rate of such increase and the necessity and purpose for which it is intended shall have been submitted to a vote of the property taxpayers of such district, paying taxes for himself, or in any representative capacity, whether resident or non-resident, on property situated within the alluvial portion of said district subject to overflow, and a majority of those in number and value, voting at such election, shall have voted therefor."

From an examination of the act of the Legislature it will be seen that it was to be "submitted to the people of the State, and if a majority of the voters at said election shall approve and ratify such amendment, the same shall become a part of the Constitution;" and the proposed amendment declares that for the purpose of constructing, preserving or repairing any levees, "the rate of taxation herein limited may be increased, when the rate of such increase and the necessity and purpose for which it was intended shall have been submitted to a vote of the property taxpayers of such district * * * and a majority of those in number and value, voting at such election, shall have voted therefor."

In *Munson vs. Board of Commissioners, etc.*, 43 An. 15, this court had under consideration, and determined the constitutionality of, Act 97 of 1890, which directed the levy and collection of certain acreage and produce taxes; and therein was drawn in question the legal operation and effect of the aforesaid constitutional amendment.

It was the contention of plaintiffs' counsel, in that case, that said legislative act was unconstitutional, because its provisions conflicted with those of the aforesaid amendment; and that it provided for a local assessment, and not a tax *eo nomine*, and was, consequently, different from Art. 209 of the Constitution.

In deciding that question this court said:

"When, however, a question arises of the necessity for increasing the burden of taxation for any purpose whatever, it is meet and proper that the property taxpayers of the district within which the increase is proposed should be consulted. And we take it to be quite a significant circumstance that there was incorporated in the amendment to Art. 214, the identical provision which is contained in Art. 209, directing that any increase of the rate of taxation therein limited shall be first submitted to a vote of the property taxpayers. It seems to be indicative of the taxing power which is conferred in each article; each being designed for similar specific purposes—the erection of a court house or the construction of a levee."

See also *Charnock vs. Levee Company*, 38 An. 323; *Planting and Manufacturing Co. vs. Tax Collector*, 39 An. 455; and *Levee Commissioners vs. Lorio Bros.*, 33 An. 276, in which analogous principles are announced.

In *Barber Asphalt Paving Company vs. Gogreve*, 41 An. 251, this court distinctly held, that "the provisions of Art. 209 of the Constitution have *exclusive* reference to *ad valorem* taxation for the purposes of revenue, and do not apply to special assessments for street improvement."

It thus appears evident that by an uniform and consistent course of decision, during a period of fifteen years, this court has maintained the principle of consistency and similarity in these several articles relating to an increased rate of *ad valorem* taxation for the purposes of public improvement; so that they have thereby become a unit—the provisions of one being, as it were, read into the other.

Evidently being mindful of the jurisprudence of the State upon this

question, the Legislature of 1894 proposed an amendment to Art. 242 of the Constitution so as to make it *read* just as it had been *interpreted* to mean, viz.:

"The General Assembly shall have power to enact general laws authorizing the parochial or municipal authorities of the State, under certain circumstances, by a vote of a majority of the taxpayers in number and amount *voting at the election* to levy special taxes in aid of public improvements or railway enterprises, etc." (Our italics.)

Notwithstanding this proposed amendment was, with various others, defeated at the general election held in 1896, it evidences as well as sanctions the interpretation that this court had theretofore placed upon Arts. 209 and 242, as being *in pari materia*.

Counsel have argued, and our learned brother of the District Court was of opinion, that this court entertained a somewhat different view of this question, in *Sentell vs. Police Jury*, 48 An. 96; but that is an erroneous supposition.

The case before the court was similar to some of the contestations we have referred to; but the court dealt with certain exceptions which the defendants had interposed in the lower court, and two of which the District Judge had sustained and dismissed the suit-misjoinder of the plaintiffs, and no cause of action.

In the course of our opinion we said:

"The exception of misjoinder is based upon the fact that some of the plaintiffs are residents of Avoyelles, and others of Orleans and St. Landry. All are alleged taxpayers."

And after approving the opinions expressed in *McKenzie vs. Tax Collector*, and *Duperier vs. Viator*, the opinion proceeds as follows, viz.:

Article 242 "deals with elections for railway enterprises, and in our view entitles taxpayers to vote. The *act* (of 1886) which puts this last article into effect, provides for the votes of non-resident taxpayers. We think that taxpayers, whether resident or non-resident, *were properly joined as plaintiffs*."

It must be observed that the opinion says that Art. 242 "entitles *taxpayers* to vote;" not non-resident taxpayers. It speaks of the Act of 1886, providing for the votes of non-residents"—an altogether different proposition. And the conclusion of the court was, "that taxpayers, whether resident or non-resident, *were properly joined as plaintiffs*"; not that they were capacitated to vote.

Having arrived at this conclusion, the court reversed the judgment, reinstated the case and remanded it for a trial upon the merits. But after the case went back to the District Court, a voluntary non-suit was entered and nothing passed by our decree.

But as neither Art. 209 nor 242 makes any provision for the method of holding elections thereunder, nor of ascertaining the results thereof, nor for the contesting of same, the Legislature is empowered by the latter article to deal with those questions as it deems best.

Consequently it was within its competency to declare who were capacitated to institute an election contest in order to have it declared void on the ground of the non-performance of certain conditions precedent, notwithstanding it was absolutely without power to prescribe the qualifications of persons to vote.

Hence in the case of *Sentell vs. Police Jury*, it was with the capacity of the plaintiffs to institute suit and stand in judgment, that we dealt, and not with their constitutional qualifications to vote. The latter question was one for the merits alone, and they had not been reached and had not been disposed of in the court below.

In keeping with that theory Act 106 of 1892 provides that "any election held under Arts. 209, 242 and 250 of the Constitution * * * may be contested by *any* party or parties in interest on the grounds of fraud, illegality or irregularity, before any court of competent jurisdiction." *Id.*, Sec. 1.

It provides that all property taxpayers have the capacity of *suitors*, whether non-residents, minors, married women, interdicted, insane or convicted persons; and surely such persons should enjoy the right to demand judicial relief from the payment of a tax on the ground of its nullity, which they had not the qualifications as voters to primarily resist at the polls. For, in this way, the equality of all property taxpayers would be in a great measure preserved; and the existence and recognition of that right would have a tendency to restrain and repress illegality and informality in the conduct of elections.

After careful consideration of the articles of the Constitution and all the adjudged cases in our reports appertaining thereto, we are prepared to affirm the opinions we have quoted and to adhere to the principles therein announced.

II.

But, pretermittin all reference to Art. 209, and confinin the discussion *arguendo*, to the provisions of Art. 242, let us consider the phrase "by a vote of the majority of the property taxpayers, in numbers and in value," and ascertain its true meaning.

It is quite significant, indeed, that the phrase is, "by a vote of the majority of the property taxpayers," etc., instead of "by a vote of the majority of *all* the property taxpayers," etc.

Between such phrases as these two, a difference has been taken by nearly all of the courts whose opinions we have examined on the subject, and with the proximate result, that in cases where the word *all* is omitted, the decisions have been, that a majority of those actually voting carries the election in favor of the tax, those not voting being presumed to have acquiesced in the result; whilst in those cases in which the word *all* occurs, an affirmative vote of *all* the property taxpayers is requisite for that purpose.

The following decisions of some of the courts of other States will serve to illustrate the foregoing propositions.

They are founded upon the precepts of text writers of the first ability, the trend of which may be summarized thus:

That the rule to guide those to whom the question is submitted is, to take the majority of votes cast as a test—those who remain away from the polls being presumed to assent to what is done by a majority of those who vote. Their silence, when they had an opportunity to speak and change the result, is taken for consent to the result. That is the settled doctrine in this country in respect to the election of officers at a general election and, also, at elections for the purpose of deciding any special proposition. McCreary on Elections, p. 114.

The Constitution of Minnesota requiring that a law relative to the removal of a county seat shall, before taking effect, "be submitted to the electors of the county * * * and be adopted by a majority of such electors," the Supreme Court of that State held that phrase to mean "a majority of those electors voting at the election * * * irrespective of the particular facts appearing in the case," etc.

To the same effect are Taylor vs. Taylor, 10 Minn. 107; Bayard vs. Kling, 16 Minn. 249.

Citizens and Taxpayers vs. Williams et als.

A statute of North Carolina, which authorized aid to be granted railroads upon same having been "voted by a majority of the voters of said town qualified to vote for commissioners," was interpreted by the Supreme Court of that State to mean a majority of the votes actually cast at the election; that all voters who did not choose to participate in the election "are to be taken as assenting to the result of the election, according to the vote actually polled." *Reiger vs. Commissioners*, 7 N. C. 318.

A Missouri statute required that all propositions "to create a debt by borrowing money for any purpose whatsoever" should be submitted "to a vote of the qualified electors of a city, and that two-thirds of such qualified voters (was necessary) to sanction the same;" and the Supreme Court of that State held it sufficient "if two-thirds of the qualified voters *who voted* at the special election voted in favor of the proposition." *State ex rel. Bassett vs. Reneck*, 87 Mo. 270.

In *People vs. Warfield*, 20 Ill. 159, the court said: ,

"The voters of the county referred to were those who should vote at the election authorized. If we go beyond this and inquire whether there were *other voters* of the county who were detained from the election by absence or sickness, or who voluntarily absented themselves from the polls, we should introduce an interminable inquiry, and invite contests in elections of the most embarrassing and baneful character, if we did not destroy all of the practical benefits of laws enacted under these provisions of the Constitution.

"We hold, therefore, that a majority of the legal votes cast at this election is sufficient to determine the question of a relocation of the county seat."

In *Railroad Company vs. Davidson County*, 33 Tenn. 636, it was held:

"When a question of an election is put to the people of a county, and is made to depend upon the vote of a majority of the voters of said county, the only proper test of the number entitled to vote in such election is the result thereof as determined by the ballot box."

In *Sanford vs. Prentice*, 28 Wis. 358, it was held that "a majority of the legal voters of a district 'meant' only a majority of those actually voting at the election."

In *Vance vs. Ansell*, 45 Ark. 400, the court held that the phrase without the consent of a majority of the qualified voters of the

Citizens and Taxpayers vs. Williams et als.

county" meant "a majority of those actually voting at the election."

In *Smith vs. Procter*, 180 N. Y. 319, it was held that the phrase "a majority of *all* the inhabitants of any school district entitled to vote" meant "a majority of those actually voting," etc.—an exceedingly strong case.

In *People ex rel. Freeman vs. Chute*, 50 N. Y. 461, the court held:

"Those who are absent from the polls, in theory and practical result, are assumed to assent to the action of those who go to the polls and vote; and those who go to the polls and do not vote for any candidate for office are bound by the result of the action of those who do, and he who receives the highest number of earnest valid votes is to be the one chosen to the office."

In *Green vs. State Board of Commissioners*, the Supreme Court of Idaho (December term, 1896) had under consideration the question whether a proposed constitutional amendment permitting women to exercise the elective franchise had been carried, at an election held under an article of the State Constitution, and the terms of which amendment were that a "majority of the electors shall ratify the same;" and the court held that a majority of those voting was all the Constitution required, and "that the ten thousand or more voters who refrained from voting must be taken to have assented thereto."

And in that case the court further said:

"This is a government by the people, who have opinions, and are willing to express them. Representatives are elected, both in Congress and the Legislature, constitutions are framed, and laws are enacted, and of right ought to be, by these men, and by these *only*."

In *Walker vs. Oswald*, 11 Atlantic Reporter, 711, it was held that those abstaining from voting "are considered to have acquiesced in the result, if the measure is adopted (by) receiving a majority of those voting upon it," etc.

In *Dayton vs. City of St. Paul*, 22 Minn. 400, it was held "that a majority of those present and voting shall be sufficient."

Our own court has followed and adopted this interpretation.

In *City vs. De St. Romes*, 9 An. 57, the question was one relating to the subscription by parishes and municipalities of the State to the stock of corporations in aid of works of internal improvement, and the statute required that such proposition must be submitted to and

ratified by "a majority of the voters on whose property the supposed tax is be levied;" and the court, through Mr. Justice Ogden, held that it was sufficient if it was "approved and ratified by a majority of the votes cast at the election."

It is true that there are many opinions which express a contrary view; but, as before observed, they construe statutes or constitutional provisions which declare that the majority of *all* the qualified electors shall favor the proposition; that is to say, very many of them.

But we do not regard it our duty to attempt to reconcile conflicting views upon the question. In such an emergency we may with safety consult the opinion of the Supreme Court of the United States as the best and final arbiter of all such disputes.

One of the principal cases to which our attention has been directed is *County of Cass vs. Johnston*, 95 U. S. 360, in which the question for determination and decision was, as to what was the proper construction to be placed upon the Missouri statute known as the "Township Aid Act," which authorized subscriptions by townships to the stock of railroad companies, "whenever two-thirds of the qualified voters *voting at an election* called for that purpose shall vote in favor of said subscription," while the Constitution of that State prohibits such a subscription "unless two-thirds of the qualified voters of the * * * town, at a regular election held therein, shall assent thereto;" and the court held that the provisions of the Constitution and the statute were substantially the same—specifically overruling the case of *Harshman vs. Bates County*, 92 U. S. 569, in which a contrary opinion had been expressed.

That a majority of legal voters requires only a majority of the legal voters actually voting at an election is "the established rule as to the effect of elections in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting unless the law providing for the election otherwise declares"—citing with approval *St. Joseph Township vs. Rogers*, 16 Wall. 644, and many of the cases we have already collated. It will be difficult to find an opinion more completely apposite and authoritative than that.

In *Douglas vs. County of Pike*, 101 U. S. 677, the Supreme Court had under consideration the constitutionality of the same Missouri

statute to aid and facilitate the construction of railroads; and they were requested to review their decision in *County of Cass vs. Johnston*, because the Supreme Court of Missouri had decided that statute unconstitutional, notwithstanding the decision in that case favoring its constitutionality.

The court did review the grounds of their decision in *County of Cass vs. Johnston*, most carefully and thoroughly, and after this examination affirmed its correctness.

In *Carroll County vs. Smith*, 111 U. S. 556, the question was of the validity and legality of an election held in pursuance of the provision of the Constitution of Mississippi and laws of that State which provide the manner in which counties of that State may grant aid to corporations, and the court said:

“The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result.”

But the most recent expression of opinion by the Supreme Court is that in *Knox County vs. Ninth National Bank*, 147 U. S. 91, in which Mr. Justice Brown, speaking for the court, said:

“Several decisions of the Supreme Court of Missouri are cited, the latest being that of *State vs. Harris*, 96 Missouri, 29, in which the court held that two-thirds of those actually voting is not sufficient,” but the court said that opinion was erroneous, and adhered to their previous rulings.

Comment is unnecessary, as those decisions are final and controlling; and we hold that on reason and authority that a majority of the property taxpayers in number and value means a majority of those voting at an election.

And thus holding, the election under consideration was legal, and the judgment appealed from is erroneous.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that plaintiffs' demands be rejected at their cost in both courts.

NICHOLLS, C. J., rests his concurrence on the ground of acquiescence.

State vs. Oriol.

DISSENTING OPINION.

BREAUX, J. I regret that I am compelled to dissent from the elaborate opinion of the court in this case.

It is conceded, if it is requisite that it be carried by a majority of the property taxpayers in number and amount, the election for the tax was defeated.

The contention of the plaintiff is that it was carried by a majority in number and value of the property taxpayers voting at the election.

The article of the Constitution applying reads: "The General Assembly shall have power to enact general laws authorizing the parish or municipal authorities of the State, under certain circumstances, by a vote of the majority of the property taxpayers in number and value, to levy a special tax in aid of public improvements or railway enterprises," thus requiring, as I think, a majority of the property taxpayers in number and value of property to carry the election,

It is different under Art. 209 of the Constitution, which, in my view, does not apply to railroads. The latter applies to public buildings, bridges, and all works of public improvement in parishes and municipalities. Improvements owned by the respective communities with whose funds they were constructed.

In the latter case, in my judgment, a majority in number and value of the property taxpayers *voting at such election* is the majority required. As I appreciate the issues, acquiescence of the taxpayer in the work done and the benefit received by him are far more persuasive than the construction placed upon the article of the Constitution, viz.: that the required majority in value and amount voting is the majority required.

No. 12,401.

THE STATE VS. JOHN G. ORIOL.

A city ordinance relating to the sale of lottery tickets, which provides that one-half of any money recovered from violators thereof shall be the property of the party who shall furnish the information on which they shall be convicted, is neither illegal nor *ultra vires*.

APPPEAL from the Sixth Recorder's Court of the City of New Orleans. *Arnauld, J.*

State vs. Oriol.

Samuel L. Gilmore, City Attorney, and *C. H. Lavillebeuvre*, Assistant City Attorney, for Plaintiff, Appellee.

Chandler C. Luzenberg for Defendant, Appellant.

Submitted on briefs March 6, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

WATKINS, J. The defendant being prosecuted on a charge of having violated City Ordinance No. 12,755, C. S., as amended by Ordinance No. 12,889, C. S., relative to the sale of lottery tickets, entered a demurrer thereto on the ground that the penal clause of said last named ordinance is illegal and *ultra vires*; and same having been overruled and the defendant found guilty, and sentenced to pay a fine of twenty-five dollars and suffer imprisonment for a period of ten days in the parish prison, and in default of paying the fine to suffer an additional term of imprisonment of twenty days, he prosecutes this appeal.

The part of the amended ordinance complained of as "illegal and *ultra vires*" of the City Council is the following, viz.:

"That one-half of any money thus recovered shall be the property of the party giving such information and testimony to the recorder, as will lead to the conviction of the offender," etc.

The City Attorney cites to us our decision in *State vs. Voss*, *infra*, p. 444, and *State ex rel. Taquino vs. Arnauld*, Recorder, *supra*, p. 104, as having disposed of the issue herein presented.

In the latter the question was of the nullity of the fine imposed, and the penalty inflicted was held to be null and void under the third section of Ordinance No. 12,755, being in excess of thirty days' imprisonment.

In the former the question was as to the legality of the second and third paragraphs of Ordinance No. 12,889, but their validity and that of the sentence imposed were affirmed.

With regard to the supposed illegality of the ordinance, in the particular paragraph cited, or that of want of power in the City Council

State vs. Voss.

to pass and promulgate it, the argument of defendant's counsel is that it is *contra bonos mores*, in that it operates as an encouragement to informers and spies.

We do not view the ordinance in that light. The operations of dealers in lottery tickets are doubtless secret and crafty, and if some inducement is not offered by the city to secure their apprehension and conviction the ordinance would speedily become a dead letter for all practical purposes.

Laws of the character of the ordinance are of frequent enactment; and they seem to us quite as defensible and praiseworthy as are the proclamations of the Governor of a State offering rewards to persons who may apprehend refugees from justice, and produce the proof upon which their conviction may be secured.

Judgment affirmed.

No. 12,358.

THE STATE VS. H. VOSS.

City Ordinance.—While it is true that ordinances making certain acts the evidence of an offence committed should be strictly construed, it does not follow that they should be pronounced null.

Act and "intent" essentials.—One accused of violating an ordinance to abate conducting lotteries as being a nuisance, is not guilty, unless there was "intent." To constitute crime there must be joint operation of act and criminal intent.

The offence.—Knowingly having tickets in one's possession in matter of conducting a lottery, or knowingly giving information of a drawing or a pretended drawing, is made the offence in the matter of conducting a lottery. The defendant by the sentence was not deprived of his property or liberty without due process of law.

Fine of \$25, or 30 days' imprisonment is the statutory limit.—The ordinance interpreted, in its entirety, does not exceed in extent of punishment the limit imposed by the legislative act.

A PPEAL from the Sixth Recorder's Court of the City of New Orleans. *Arnauld, J.*

James J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for Plaintiff, Appellee.

Chandler C. Luzenberg for Defendant, Appellant.

49	444
49	443
49	144
50	762
49	444
52	1082

Submitted on briefs February 19, 1897.

Opinion handed down March 1, 1897.

The opinion of the court was delivered by

BREAUX, J. An affidavit charged defendant with having violated an ordinance of the City Council relative to lotteries.

He was tried, found guilty and sentenced to pay a fine of twenty-five dollars and to ten days' imprisonment, and in default of payment of the fine, to an additional imprisonment of twenty days in the parish prison.

Upon his trial he alleged that the ordinance was illegal and unconstitutional.

From the sentence he has appealed.

In this appeal, the defendant, in the first place, urged that Sec. 2 of the ordinance, which reads as follows: "That it shall not be necessary to prove the actual sale of lottery tickets in any space, house, office or premises, but any sign, tickets, sheets, bulletins or other device used to indicate that tickets are kept for sale, or to give information as to the result of any drawing or pretended drawing, shall be taken and accepted as a sufficient proof of the keeping of a lottery office or shop," was illegal and unconstitutional.

The complaint of the defendant was that any ordinance which makes the finding of a lottery ticket or device, on the premises, or on the person of a defendant, sufficient proof of his keeping a lottery shop, is depriving him of his liberty without due process of law.

The section of the ordinance against which this complaint is directed reads:

"That it shall not be necessary to prove the actual sale of lottery tickets in any space, house, office or premises, but any sign, tickets, sheets, bulletins, or other device used to indicate that tickets are kept for sale, or to give information as to the result of any drawing or pretended drawing, shall be taken and accepted as a sufficient proof of the keeping of a lottery office or shop."

The following is quoted by counsel for the appellant, and made the basis of his clearly presented points in argument:

"The law delights in the life, liberty and happiness of the subject, consequently it deems statutes which deprive him of these, however necessary they may be, in a sense odious. For which, as for kindred

reasons, as well as because every man should be able to know certainly when he is guilty of crime, statutes which subject one to a punishment or penalty, or to a forfeiture or a summary process calculated to take away his opportunity of making a full defence, or in any way deprive him of his liberty, are to be construed strictly." Bishop Statutory Crimes, Sec. 193.

Upon this point we agree with Mr. Bishop and with counsel, in such cases as those alluded to in the quotation; in our view, also, the construction should be strict, but from this agreement in opinion it does not follow that the ordinance assailed should be declared a nullity upon the grounds urged. In our judgment, as we read the ordinance, it does not say that the holder of a ticket is, by the mere fact that he is a holder, guilty as charged.

If one, without guilty knowledge or intent, is in possession of a lottery ticket, it can not be taken of itself as being sufficient proof of guilt. One of the indispensable elements of crime is wanting. To constitute crime there must be joint operation of act and criminal intent. Under the language of the statute, to our thinking, the fact that one is engaged in the business of selling tickets or in giving information as to the result of any drawing, or pretended drawing, constitutes the offence denounced. One accused is certainly not guilty unless it is satisfactorily shown that he knowingly had the tickets in his possession, or knowingly gave information as to the result of any drawing or pretended drawing. Either act is the offence denounced, and it may be made evident from either—that the one thus committing the act is engaged in conducting a lottery shop, without thereby defeating the purpose of the ordinance.

The section requires, to convict an accused "any sign, tickets, sheets, bulletins, or other device used to indicate that tickets are for sale, or to give information as to the result of any drawing or pretended drawing," a well-known business, giving rise to the conclusion stated in the ordinance that he is conducting a lottery office.

In the second place, the appellant urges that any section of an ordinance which permits a recorder to sentence an accused to an imprisonment of more than thirty days is *ultra vires* and illegal.

It must be confessed that the language of the ordinance is not as clear as it might have been, but we think it sufficiently fixes the limit.

State vs. Zurich.

Section 3 of the ordinance is as follows: "That whoever shall violate the provisions of this ordinance shall, upon conviction before the recorder within whose jurisdiction the offence is committed, be condemned by said recorder to pay a fine not to exceed twenty-five dollars, or imprisonment in the parish prison for a term not to exceed thirty days or both, in default of the payment of said fine; provided, that the fine shall not exceed twenty-five dollars, nor the imprisonment more than thirty days.

By Act 41 of 1890 the Council may enforce obedience to and punish the violation of ordinances "by fine or imprisonment or both, or by imprisonment in default of the payment of the fine; provided that the fine shall not exceed twenty-dollars for each offence, nor the imprisonment more than thirty days.

The ordinance interpreted as a whole does not, in our judgment, exceed that limit. Without the proviso the recorder would be authorized to impose a fine of twenty-five dollars, with imprisonment of thirty days for the violation of the ordinance and an additional thirty days' imprisonment for the non-payment of the fine—that is, if the fine were not paid the imprisonment might be as much as sixty days, but it is saved by the proviso limiting the fine to twenty-five dollars and all imprisonment to thirty days. The penalty is thereby kept within statutory limitation.

The sentence and fine imposed upon the accused were within the limit of the *proviso*.

The sentence and judgment appealed from are affirmed.

No. 12,221.

STATE OF LOUISIANA VS. VALERIAN ZURICH.

There is no delegation of power in the city charter of New Orleans to create as a MISDEMEANOR, punishable by fine and imprisonment, the non-compliance by an owner of property therein, of an ordinance prohibiting owners of property from erecting buildings on their premises until they had obtained the consent of the city engineer to the building of the structures (as being in conformity to city regulations) and until they had obtained a permit from him.

The appellate jurisdiction of the Supreme Court, in cases in which the constitutionality or legality of the fine, forfeiture or penalty imposed by a municipal authority was in contestation, is limited to a determination of the constitutionality of the fine, forfeiture or penalty, and to an examination of the particular facts necessary to be considered in order to reach a conclusion on that subject.

A PPEAL from the Third Recorder's Court of the City of New Orleans. *Thompson, J.*

49	447
49	347
49	447
50	955
51	1094
51	1095
49	447
4104	608
104	684
49	447
106	705
49	447
111	113
49	447
117	427
49	447
118	55
118	752

State vs. Zurich.

Samuel L. Gilmore, City Attorney, and *James J. McLoughlin*, Assistant City Attorney, for the City of New Orleans, Plaintiff, Appellee.

Benjamin Rice Forman for Defendant, Appellant.

Argued and submitted November 7, 1896.

Opinion handed down November 16, 1896.

Rehearing refused February 15, 1897.

STATEMENT OF THE CASE.

The defendant was tried before the Third Recorder's Court upon the affidavit of a police officer, charging, under oath, that the defendant "did, on Monday, June 22, 1896, between the hours of three and four P. M., on Walnut and Front streets, within the jurisdiction of the Third Recorder's Court, then and there erect a building without a permit, in violation * * *"

"Wherefore, he (deponent) charged the accused with erecting a building without a permit, and prayed that he be arrested and dealt with according to law."

The ordinance of which a violation was charged was City Ordinance No. 6538, C. S., the 28th section of which is as follows:

"If the owner or owners of any lot or portion of ground whereon any building is to be constructed or erected, or of any building already erected, whereon any repairs, alterations or additions are to be made, shall begin such construction or alteration, etc., without having first obtained the certificate required in Sec. 1 of this ordinance, he shall be deemed guilty of a misdemeanor, and he shall be subject to a fine of not less than five nor more than twenty-five dollars, and * * * on his failure to pay said fine he shall be imprisoned in the parish prison one day for each dollar of the fine imposed."

The first section of the ordinance declared "that no building should be erected, or its erection commenced, or any alteration made on any building already erected or to be thereafter erected, unless plans and specifications, or a copy thereof, together with the contract cost thereof, should have been first submitted to the City

Engineer, and a certificate of approval and a permit granted by him therefor; and made it the duty of the City Engineer, without immeasurable delay, to issue such certificate, when such plans and specifications conform to the ordinance."

Certain rates were charged for permits, graduated according to estimated cost of building.

The title of the ordinance is "An ordinance for the proper construction of buildings; more effective prevention of fires, and for the better protection of life and property, and to be known as a general building ordinance for the proper construction of buildings in the city of New Orleans." It was adopted on July 5, 1892.

In its different sections, the Common Council undertook to lay down and establish rules controlling and governing the erection and repairs of buildings in the city of New Orleans, designating the kind of material to be used in certain limits, the character of the roofs, the thickness and height of walls, the supports of floors, etc.

The accused pleaded that the city of New Orleans was without power or authority to enforce any penalty for erecting a building without a permit; denied that he did at the time and place mentioned erect any building without a permit, and pleaded not guilty to the charge.

No separate and direct action was had on the plea as to the power of the Common Council to pass the ordinance, but the case went to trial; evidence was heard and judgment was rendered, imposing a fine, with alternative imprisonment, thereby maintaining the legality of the ordinance.

The opinion of the court was delivered by

NICHOLS, C. J. Appellant directs our attention to the evidence, from which, he states, it would appear that he was about to build a boat for the Mexican government on the shore at the water's edge of the Mississippi river; that he erected (one hundred and twenty feet outside of the public levee) near the water's edge, with the permission of one Bisso, the riparian proprietor of the land fronting at that point on the river, a temporary awning or shed to protect his workmen while working from the sun and rain, and enclosed one end of the same as a small closet in which to lock up his tools, the cost of the whole not amounting to more than one hundred dollars; and he maintains

State vs. Zurich.

that an examination of the ordinance would show that it applied only to houses in the city, and did not apply to boats on the edge of a navigable stream.

He also calls to our attention that the recorder had imposed a heavier fine than the ordinance authorized even if it was violated; that the ordinance provided a penalty against the owner of the ground of not less than five dollars nor more than twenty-five dollars, and that on failing to pay the fine he should be imprisoned one day for each dollar of fine imposed, whereas the recorder had fined him twenty-five dollars or thirty days' imprisonment.

He argues to us, also, that nowhere has the power been given to the Common Council to prohibit the erection of a building without the permission of the City Engineer; that this would be a delegation of power not to be tolerated in a free country (citing *State vs. Bright*, 38 An. 1).

He further contends that a violation of the city ordinance could not be prosecuted in the name of the State of Louisiana, and that the police officer was without authority to advance a charge of the character which had been brought.

No brief has been filed on behalf of the city of New Orleans, nor argument made as to the question raised of the power and authority of the City Council to pass the ordinance in question. The City Attorney very frankly admitted, in open court, that, in his opinion, the sentence imposed by the recorder was not justified by the facts, and that the provisions of the ordinance did not extend to the acts done by the defendant. Counsel of the latter has pressed that admission upon us, as also the evidence itself in the record touching the facts, and urged that we reverse the judgment upon the merits, by reason of the facts and also upon the want of power in the recorder to pass the sentence he did (it being in excess of the penalty declared by the ordinance), independently of any question as to legality of the ordinance. The proceedings in the case are of a criminal character, and, as such, are not reviewable by the Civil District Court or Court of Appeals.

Defendant's relief must be found in this court, if at all, either through appeal, or under our supervisory jurisdiction.

We have on a number of occasions declared that our appellate jurisdiction, under Art. 81 of the Constitution, in cases in which the constitutionality and legality of any fine, forfeiture or penalty imposed

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by a municipal corporation was in contestation, was limited to determination of the question of the constitutionality or legality of the fine, forfeiture or penalty itself, and to an examination of the particular facts necessary to be considered by us, in order to reach a conclusion on that subject; that we were not, on appeal, authorized to examine into facts, which assuming the fine, forfeiture or penalty itself to be legal and constitutional, simply would go to show whether the accused was or was not guilty under the ordinance imposing the penalty; that questions of that kind, in allowable cases, could only be brought before us under and through our supervisory jurisdiction. *State vs. Callac*, 45 An. 29; *State vs. Courcier*, 48 An. 907; *State vs. Dean*, 45 An. 441; *State vs. Fourcade*, 45 An. 722; *State vs. Marshall*, 47 An. 646; *Suthon vs. Houma*, 48 An. 1581, 1582; *Pfaff vs. Holmes*, 43 An. 129; *Breazeale vs. Frank*, 42 An. 226.

We have examined the charter of the city of New Orleans (Act No. 20 of 1882) to ascertain what powers were conferred by that instrument upon the Common Council. The eighth clause of Sec. 8 authorizes the city "to determine within what limits wooden buildings shall not be erected, and to prevent the reconstruction of old buildings within such limits." The ninth clause of the same section authorizes it "to regulate the safety, height and thickness of the walls and structures."

We find nothing more in the charter bearing on the subject of buildings or structures within the city.

As matters are presented to us, we do not understand that the right of the city to pass ordinances "regulating the safety, height and thickness of the walls and structures," as conferred by the ninth clause above mentioned, is before us, nor is that of the city to exact that, prior to building or altering structures, parties proposing to do so should submit plans and specifications of the same to the City Engineer, nor is that of the city to appoint a City Engineer, and to devolve upon him the duty of inspecting the plans and specifications submitted, in order to ascertain whether the proposed building or alteration will be in conformity to the ordinances of the city regulating structures, nor the right of the city through the City Engineer, or otherwise, to institute civil legal proceedings against owners, either by way of prevention by them of violation of the ordinances regulating structures or for punishing parties who have, in point of fact, violated the same, and forcing what has been done to be undone.

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Defendant has not been charged with having erected a building or structure which does not come up to the standard requirements of the city ordinances; he has not been charged with not having, before erecting a building, submitted plans and specifications to the City Engineer. What he has been charged with, and what he has been convicted of, is, of having, without the prior approval by the City Engineer (evidenced by a permit from him), erected a building. The question, therefore, is, whether the City Council has the power and authority to impose upon owners, as a condition precedent to the exercise of a right by them of erecting buildings upon their property or of making alterations in buildings already erected that they should have the prior approval of the City Engineer to those buildings or alterations evidenced by his permit and to make the erection or repair of such buildings without such prior permit a misdemeanor punishable by fine and imprisonment. The power of the city to order an inspection, through the City Engineer, of the buildings and alterations after they are made, or as they are in progress, is not denied, nor is the liability of the owner to have civil proceedings taken against him, to compel him to conform to the regulations of the city on the subject of structures. What is denied is that the right springing from ownership to build structures upon one's premises, or to make alterations upon the same, can be made to be held in abeyance by and subordinated to the prior consent of a city official under penalty of a criminal prosecution.

Defendant affirms that property rights are arbitrarily, unreasonably and illegally hampered by an ordinance which substantially creates a tribunal from whose decision in the premises no legal method of review has been provided, and which would force owners into affirmative, active, legal proceedings, in order to exercise rights which should be free and untrammelled, unless and until actually exercised or attempted to be exercised in violation of law. They contend that while it may be perfectly legitimate for the city to pass regulations on the subject of certain buildings within its borders, and devolve upon a particular officer the duty of seeing that the regulations made by the city are conformed to, his duty could not be made to extend beyond ascertaining whether buildings, or alterations thereto, or proposed to be made, would be in violation of ordinances, or those actually erected were so violative, and to instituting civil legal proceedings against the parties, either by way of prevention or remedy.

He contends that the city has no authority to appoint a city official and to delegate to him the power of primarily determining whether the owners of property should be permitted to exercise their property rights or not under penalty of a criminal prosecution.

We have reached the conclusion in this case that the ordinance in question in so far as it seeks to create as a misdemeanor the erection by an owner of a building upon his property without having first obtained a certificate of approval or permit of the City Engineer, and to subject the owner, in case of conviction of violation of the prohibition of the ordinance, to fine and imprisonment, can not be sustained. We have examined, as we have said, the charter of the city and have failed to discover in it anything which would tend to show any delegation of the right to impose, through criminal proceedings, a fine or imprisonment upon an owner of property for non-compliance with an ordinance requiring him to postpone the erection of a building upon his premises until he had obtained the consent of the City Engineer to the building proposed to be erected (as being in conformity to the city regulations), and obtained a certificate or permit from that officer.

In *State vs. Bright*, 38 An. 4, we declared that it was acknowledged by text writers and supported by abundant authorities that a municipal corporation had no right to enforce obedience to the ordinances which it has the power to pass, by fine or imprisonment, or other penalty, unless that right has been unquestionably conferred by the lawgiver; for this is inflicting a punishment for the commission or omission of an act declared an offence, a prerogative, which, as a rule, appertains to the sovereign alone (citing *Dillon*, par. 336, p. 553, *Desty on Tax.*, p. 765), and that the words "shall provide for the punishment of any violation of such ordinances or regulations by fine or imprisonment," found in Sec. 7, referred to ordinances which the Common Council was authorized to pass and have executed as might be necessary and proper to preserve the peace and good order of the city and to maintain its cleanliness and health. This decision was in line with the cases, 6 An. 515 (*Municipality vs. Pance*), *State vs. Manessier* (*Opinion Book* 53, p. 237), and 34 An. 750 (*State vs. Patamia*).

The ninth section of the charter of the city authorizes it "to regulate the safety, height and thickness of the walls and structures." The ordinance we are considering was passed, presumably under

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that grant of power, but the council, after laying down in the ordinance specific directions as to what constitutes safe building, made the erection of buildings in contravention of these provisions a misdemeanor which would subject parties contravening the same to liability to fine and imprisonment, and created as a MISDEMEANOR "the erection of buildings without having first obtained the approval and permit of the City Engineer."

Under the ordinance a person erecting a building in strict conformity to what the council had laid down as the rules of safety governing structure would, none the less, be subject to fine and imprisonment—his offence being not a violation of the rules themselves of safety, but of the violation of a rule which the council thought proper to establish in supposed incidental aid of the observance of the rules.

We do not think the city has the authority to enforce criminally this obligation incidentally imposed upon property owners by fine and imprisonment for non-observance of the same.

Ownership gives the right to one to enjoy and to dispose of one's property in the most unlimited manner, provided it be not used in any way prohibited by laws or ordinances. (O. C. 491.) So long as an owner does not use his property in a way prohibited by law or statute, he is free to act. The city of New Orleans had no authority to hamper it and make its exercise depend upon a prior permit or consent of the City Engineer under penalty of criminal prosecution. There are ample adequate, legal remedies open to the city for the enforcement of the city rules. Opposition may be made to every species of new work from which injury is apprehended. Parties insisting upon erecting illegal or improper structures may have their work suspended by order of court if necessary. Works done in spite of opposition may be destroyed in proper cases and matters replaced in the former situation. The method selected by the council for enforcing their ordinance by subjecting property owners to a criminal liability to fine and imprisonment for the mere fact of building upon their own premises, without the prior consent and permit of the city, is, in our opinion, not only arbitrary and unreasonable, but the city is without authority to adopt it. It fetters the rights of ownership in an unwarranted degree.

It is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and re-

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versed; and it is now ordered, adjudged and decreed that the prosecution be dismissed.

ON APPLICATION FOR REHEARING.

In the brief of the counsel for the city of New Orleans applying for a rehearing it is said:

“When this case was submitted to the court counsel for appellee conceded that Ordinance 6533 did not apply to the offence of which defendant was convicted, and that the action of the recorder was a manifest error. The court was asked in view of this admission to reverse the judgment without considering the legality of an ordinance which both parties to the suit declared was not applicable to the state of facts. It is true that were the court to examine this case strictly under its appellate jurisdiction it might be compelled to exclude consideration of the facts. But it is urged upon the court that in this case where both parties have agreed upon the facts and where both parties have urged the court to act upon the facts, it is certainly within its equity powers to treat this particular case as if it came under its supervisory jurisdiction.”

In the exercise of the powers granted to us under Art. 81 of the Constitution in the class of cases giving an appeal when the legality or constitutionality of a fine imposed by a municipal ordinance is in contestation, we are constantly called on (under the limitations of that article) to grant relief of the same character as that which we would grant in other matters through writs of prohibition—that is to say, on appeal in such cases we pass upon the powers and authority of the municipal body which enacted the ordinance complained of. It is possible we might be authorized, in exceptional cases, to avail ourselves of our having jurisdiction of the main action to declare (as a concurrent remedy with *certiorari*), under Arts. 608 and 609 of the Code of Practice, that the judgment appealed from was a “nullity” when the nullity was apparent on the face of the record. Arts. 608 and 609 of the Code of Practice declare that the nullity of a judgment may be demanded from the court which has rendered the same, or from the court before which the appeal was taken, but that the nullity can only be demanded on the appeal when the nullity is apparent on the face of the record. A practice similar to this (that is to say, throwing inside the powers of an appellate court certain matters ordinarily falling under “supervisory”

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jurisdiction) seems to prevail in California, though on what particular ground it is based we do not know. (See 26 Pacific, 386, 387, and cases cited.)

Counsel of the city calls our attention to the fact that the recorder, in rendering the judgment which he did, exceeded his jurisdiction in inflicting a heavier penalty than the law authorized, and suggests that, upon that ground, we could reverse the judgment without passing upon the legality of the ordinance. Granting that we could do so, our decree to that effect would give a very imperfect remedy, for the utmost we could do would be to send the case back for a proper sentence, leaving the judgment intact.

The party seeking relief at our hands has selected an appeal as the method of obtaining it. We can only dispose of cases as we find them. In appeals of the character of the present, we have repeatedly held that the issue before us was restricted to the question of the legality and constitutionality of the ordinance upon which the prosecution was based, and did not extend to a decision upon the correctness of the judgment appealed from. To reverse the judgment we should be able to declare, and should in fact declare, that the ordinance whose violation was sought to be punished was, or was not, constitutional or legal. The admissions made by counsel of the city in this case would lead up to no such conclusion or result; on the contrary, the character of the ordinance itself or its binding force would be left untouched, and the only matter upon which our action would be invoked would be as to whether the judgment of the recorder was correct or not. It is expressly conceded by counsel that the provisions of the ordinance do not extend to the state of facts shown. If that be true, then we are not in a position to express any opinion about the legality or constitutionality of the ordinance itself.

The very foundation of the right of the city to insist that the judgment of a recorder's court, in the matter of the conviction under a municipal ordinance, should remain untouched under an issue as to the legality of the ordinance, would be to insist not that the ordinance did not extend to the facts shown, but, on the contrary, that the ordinance did extend and was intended to extend thereto, and that so extending and so intended to extend the ordinance was still legal. On the other hand, the foundation of the right of the party who had been convicted under the ordinance to have the judgment

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appealed from reversed would be the counter claim made by him that granting, as a conceded fact, that his acts, such as they were charged or shown, fell under the precise terms of the ordinance, none the less he could not be convicted under it, because if held to so apply the ordinance would be unconstitutional or illegal. Were this case before us under a contention of that precise character between the parties, we might be justified in determining and declaring whether the ordinance was legal or constitutional or reasonable or not; but if we were to give effect to the admission of counsel of the city we could not reverse the judgment, as they ask us to do on rehearing. We would have to dismiss the appeal. Appellant necessarily objects to admissions which would affirm the judgment. He contends that, granting that he actually did what the city charges him with having done, and granting that his case fell under the precise terms of the ordinance as charged in the complaint against him, he none the less could not be fined or imprisoned, because the directions of the ordinance that he should, through criminal proceedings, be fined for doing the act for which he stood charged and convicted were illegal. The question comes back to us: what was the particular act which under the ordinance was made a "MISDEMEANOR," and what the particular act for which he was prosecuted, and what the powers of the city in respect to it. An examination of the complaint shows that independently of any question whether the constructions which appellant had put up conformed to the requirements of the regulations of the city in respect to constructions, and independently of any question as to whether he had obeyed the provisions of the ordinance requiring him prior to making the same to have submitted the plans of the same to the City Engineer, he was charged as for a criminal offence, because he had, in violation of the terms of the ordinance, put up his constructions before having obtained a permit from the City Engineer. A simple failure to have done this could not, in our opinion, be by the City Council, under its powers, made a "misdemeanor," punishable by fine or imprisonment.

Unless we could have either said this or could have announced that we upheld "the legality of the ordinance," we would have been forced to dismiss the appeal.

Rehearing refused.

MR. JUSTICE MILLER dissents.

Coach vs. Hake.

No. 12,406.

WILLIAM COACH VS. WILLIAM HAKE.

A partition by licitation can not be ordered against the prayer of one of the co-proprietors, when it is shown that a division in kind is not practical, or that loss and inconvenience would be suffered by one of the co-proprietors by a division in kind. Where all the co-owners would fare alike a division in kind must be ordered.

A PPEAL from the Fourth Judicial District Court for the Parish of Grant. *Machen, J.*

John C. Ryan and W. C. Roberts for Plaintiff, Appellee.

R. J. Bowman for Defendant, Appellant.

Submitted on briefs February 18, 1897.

Opinion handed down March 1, 1897.

Rehearing refused March 29, 1897.

The opinion of the court was delivered by

MCENERY, J. The plaintiff and defendant own in common six thousand four hundred and fifty-six 79-100 acres of pine lands, valuable for the timber upon them for saw-mill purposes.

The plaintiff brought suit to partition these lands, and prayed for a partition by licitation. The defendant asked for a partition in kind. In his answer he prayed for an injunction, staying the order for a partition, on the ground that a suit was pending in another State to settle certain partnership affairs between them. The injunction was dissolved, with fifty dollars damages as attorney fees, and a partition by licitation ordered.

The defendant appealed.

The partition proceedings seem to present the sole issue.

The testimony in the record is meagre, and does not impress us that a partition by licitation would be beneficial to both parties.

R. W. Bringhart, the parish surveyor, says he is well acquainted with the lands, and that, in his opinion, the lands should be sold to make a just partition between the parties. His belief is based on the fact that the land would bring more in money if sold at public sale

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(we infer that he means the lands would be more valuable if in one ownership), and in his opinion the lands could not be divided in kind without diminution in value, because they are in alternate sections, some convenient to railroad and water transportation, and others are not. That the sections are not uniformly timbered. The main reason assigned for the impractical division in kind is that the land is not in a solid body.

Another witness in general terms corroborates this testimony. It is stated by both that in building trams to reach the timber in some localities, circuitous routes would have to be adopted, and some localities over hill lands.

But witnesses and the single witness for defendant say, that if sold without benefit of appraisalment, as ordered, the co-owners without money would be at a disadvantage.

The rule is for a division in kind when it can be made. If by a division in kind the co-owners can be justly dealt with, and each share equally alike, the mere fact that a possible higher price for the land may be obtained by a public sale is not sufficient to overcome the demand of one co-owner for a division in kind. He is entitled to his part of specific property, if it can be given to him without imposing loss or inconvenience on his co-owner.

The land can be divided into two parts. There are no physical objections of such character that the owner of one of the shares would be subjected to great inconvenience or appreciable loss.

The judgment so far as it dissolves the injunction with damages is affirmed; that part of the judgment ordering a partition by public sale is avoided and reversed, and it is ordered that on this part of the case it be remanded to be proceeded with in due course of law, the defendant to pay all costs of the injunction, and the plaintiff to pay costs of appeal in the matter of the partition.

No. 12,396.

COMMERCIAL SOAP WORKS, LIMITED, ET ALS. VS. F. A. LAMBERT
COMPANY, LIMITED, ET ALS.

Courts have no power to enjoin the creditor from suing his debtor, merely because the suit is brought in another State to subject to the creditor's demand the debt contracted here by the corporation domiciled in that State with an agent here to represent it, and because this is the domicile of the debtor.

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A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

E. Evariste Motse for Plaintiffs, Appellants.

Chaffe & Bowers, Saunders & Miller and *Dinkelspiel & Hart* for Defendants, Appellees.

Submitted on briefs March 4, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiffs seek an injunction to restrain creditors from prosecuting suits in New York to subject to execution a fund there belonging to the debtor, also the debtor of the plaintiffs.

The allegations of the petition are that the debtor is insolvent; that the creditors suing in New York are citizens of Louisiana; that our law makes the property of the debtor the common pledge of his creditors; that the object of the creditors in seeking the New York courts is to obtain an unjust preference over other creditors here; that the debtor and those holding the fund in New York are combining with the debtor to secure that preference for those he proposes to favor, prejudicial to the rights of petitioners. The lower court refused the injunction and plaintiffs appeal.

The proposition of the petition is, that the courts, under the circumstances alleged, have the power to enjoin the creditor from obtaining judgment against his debtor. Whether the creditor sues here or in another State, his right of action, except under well defined conditions arising out of positive restrictions in the Code, or our jurisprudence, can not be questioned. We can not perceive that the petition states any case to authorize the denial of defendants' right of suing their debtor. That he is insolvent furnishes usually the cause for suit, and that advantage the creditor who sues promptly is apt to secure over the less active creditor furnishes him no cause of complaint. The alleged attempt of the creditors in the New York courts to secure an unjust preference, suggests the remedy our law prescribes to secure equality of the rights of creditors of an insolvent debtor. R. S., Sec. 1781 *et seq.* When the

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debtor makes a cession voluntary or forced, our courts, to secure an equal distribution, exert a jurisdiction to enforce from our own citizens the respect due to our laws and will restrain them from bringing suits in another jurisdiction against the insolvent debtor which they could not bring here, and thereby by attachments or judgments obtain preferences or advantages as creditors of the insolvent. The plaintiffs are not in position to invoke that relief. Hayden, Syndic, vs. Yale & Bowling, 45 An. 362, and authorities there cited.

We have given attention to the plaintiffs' argument that the debt in New York sought to be reached by the creditors' suits there is due by a foreign corporation doing business here; that in a double aspect our courts should control the application of the debt for the satisfaction of all the creditors here: first, because the *situs* of the debt is here; second, because here contracted by the agent of the foreign corporations to be deemed subject to our laws, and because it is due here, the domicile of the debtor. We think, if the corporation was here, our courts could not exert that control sought by the injunction to restrain the creditor from suing his debtor.

In no aspect of the case can we perceive the basis for the relief sought.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,392.

SUCCESSION OF L. OCTAVE HYMEL.

ON OPPOSITION OF MRS. F. E. TASSIN.

A provisional account was filed by the executor.

It was opposed by a renouncing co-heir, who was a creditor.

The account was homologated so far as not opposed, leaving for future determination the issues raised by the opposition, carrying with it the renunciation.

The judgment of homologation made evident the acceptance of the succession by those heirs who had not renounced.

On trial of the opposition the claim of opponent, as a creditor, was rejected and effect was given to the renunciation.

On appeal the judgment was affirmed, save as to the renunciation.

The near kinship of the heirs, and the fact that there was possibility of an intended waiver of the advantage and benefit resulting from the renunciation, owing to the further fact that the renunciation was hastily made, without cause (although it was not made in ignorance), the court remanded the case for further evidence upon this point.

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On this appeal, it is manifest, that the accepting heirs had accepted the succession before the renouncing heir had attempted to revoke her renunciation and claimed all the advantages and benefits resulting from the renunciation.

Heirs duly cited, who do not object, but, on the contrary, practically accept the account as correct, the account being approved and homologated, inherit the rights (and charges) of the estate, including the accretion, for the benefit of the heirs who have accepted.

One who renounces can not revoke her renunciation after her co-heirs and co-legatees have accepted the succession.

APPEAL from the Twenty-first Judicial District Court for the Parish of St. Charles. *Rost, J.*

James Legendre and Robert G. Dugué for Executor, Appellee.

Fenner, Henderson & Fenner and Jos. F. Poché for Opponent, Appellant.

Argued and submitted March 3, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

BREAUX, J. Before proceeding to the consideration of the particulars of this case, it is proper, we think, to recall the issues presented in the case bearing the same title. Succession of Hymel, 48 An. 737.

The controversy grew out of an opposition by Mrs. F. E. Tassin, claiming that as an heir of her mother she was a creditor of her father's succession, and that her claim should be placed on the account of administration of the succession.

There were only three children, heirs of the late L. Octave Hymel, at the date of his death: Mrs. F. E. Tassin and her two brothers, Seraphin Hymel and Joseph R. Hymel.

In his will, L. Octave Hymel, after bequeathing comparatively small amounts to several of his grandchildren, and a few movables, and ten thousand dollars to his son, Joseph R. Hymel, appointed him executor, and bequeathed the *residuum* of his estate to his three children jointly.

An inventory was taken of the decedent's estate, showing assets

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appraised at thirty-seven thousand six hundred and eighty-one and six-one-hundredths dollars.

Subsequently, the executor filed a provisional account in which, after payment of the debts and special legacies, he distributed an amount of succession fund to each of the heirs in equal portions. The executor provoked a judgment homologating the account so far as not opposed. The judgment recites that no opposition had been filed save the opposition of Mrs. Tassin. The latter, at the date that her opposition was filed, had renounced in due form the benefit of the residuary legacy in her favor, and had abandoned all hereditary rights in the succession over and above the *legitime*, and had expressly restricted her claim to the *legitime* and the amount for which, she averred, she was a creditor.

Judgment was rendered dismissing her opposition, rejecting opponent's claim as a creditor, giving effect to her renunciation, and distributing the funds.

In the brief in support of the application for a rehearing Mrs. Tassin, through counsel, urged that the judgment of the District Court (to which we have before referred), homologating the account, which begins as follows: "The law and the evidence being in favor of the executor and against the opponent, Mrs. Tassin, it is ordered, adjudged and decreed that the opposition of Mrs. Tassin be and it is hereby dismissed at her cost," completely disposed of the issue before the court, and that from the moment the opposition was dismissed the function of the court was ended; that the prior judgment homologating the account, so far as not opposed, became, with the dismissal of the opposition, absolutely final and effective, and that no further decree was either necessary or appropriate. She urged further, in matter of this homologation of the account in question, that the judge committed an error, and acted *ultra petitem* in proceeding, as he did, to amend the account by striking out an allowance in her favor, which the executor himself had judicially admitted to be due to her, which he had expressly prayed might be confirmed and approved by the court, which, with full knowledge of her renunciation, he had proven to be correct, and had actually adjudged to be correct, save only as opposed by Mrs. Tassin, and in the absence of any prayer that judgment can not be given for more than is claimed. In the brief it was stated that the silence of the executor and of the heirs, after Mrs. Tassin had filed her opposition and published her

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renunciation, their persistence in the prayer to have "the funds distributed in accordance with the account," their action in provoking a judgment of homologation without even suggesting any amendment, their failure at any time to ask any amendment of the account, indicated their unwillingness to claim judicially the benefit which they might have claimed from Mrs. Tassin's renunciation, and amounted practically to a waiver of such benefit. We believe, added counsel in the brief, they so intended it, and that not one of them would have been willing to file any pleading in court asking their sister, notwithstanding her renunciation, should be deprived of what her father had bequeathed to her.

The court remanded the case for the purpose stated in the decree remanding the case.

After the case had been remanded Mrs. Tassin offered to revoke her renunciation of the legacy left her by her father, and expressed her desire to avail herself of the benefit of his will.

Before the attempted revocation had been filed, the executor filed a final account of administration, in which he stated that, in view of Mrs. Tassin's renunciation which enured to the benefit of her co-heirs, he proposed to distribute the funds of the succession between himself, as an heir, and the children of Seraphin Hymel, his only co-heir. He prayed for legal service of the account upon Mrs. Tassin and the children of Seraphin Hymel.

The executor interposed a plea against any attempt by Mrs. Tassin to revoke her renunciation after (he alleged) her co-heirs had accepted the succession and the benefit of the renunciation.

All the heirs joined in this plea, and claimed the benefit of the renunciation.

Judgment was rendered maintaining the validity of the renunciation, dismissing Mrs. Tassin's demand, and the opposition homologating the account.

Before finally exercising the power of deciding the issue growing out of the renunciation of the legacy, we determined to let the interested parties be heard a second time, particularly for the reason suggested, of a possible waiver by the co-heirs of any advantage or benefit resulting from the renunciation.

Under the rules of practice effect was given in the court below to the renunciation, evidence of which was admitted, although not alleged. There was, we believed, when the case was before us on

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appeal, a possibility that between a brother and the children of a brother deceased and a sister, dividing their patrimony, (despite her renunciation made *sine causa*), she would by them be offered the opportunity to revoke this hasty and improvident act. In matters which may trench upon family peace and family union, in regard to which the State itself as a question of policy should not be entirely unconcerned, courts may, in the exercise of their sound legal discretion, require direct and positive evidence. In pursuance of this purpose, to the co-heirs were given the opportunity to disavow the effect of a technical ruling of the District Judge, which was not unalterably binding.

They did not, however, decline to avail themselves of the advantage—on the contrary, they eagerly sought the right accruing from the renunciation, on the trial after the case had been remanded.

There is now only one question remaining—that is, whether prior to May 2, 1896, when Mrs. Tassin filed her revocation of her renunciation, her co-heirs had accepted the succession.

It is proper here to state: it is conceded by all parties concerned that the renunciation can not be revoked if the co-heir has declared his wish to profit by it or has accepted the succession, which is substantially the principle expressed in Art. 1031 of the Civil Code authorizing withdrawal of renunciation.

We believe that the heirs intended to accept, and that they had accepted at a date prior to May 2, 1896, when Mrs. Tassin filed her asserted revocation.

Our reasons for thus concluding are: there was cash in the possession of the executor which he sought to distribute among the heirs.

Two accounts had been filed; one a provisional and the other a final account. (The heirs were duly notified.)

The first was homologated in so far as not opposed; the second was filed on the 23d of April, 1896.

With reference to the first account; it was finally homologated as a whole. It is true that the opposition of Mrs. Tassin was dismissed as urged by her counsel. It remains that the judgment of dismissal did not have the effect of striking out the renunciation she had made and the evidence of which renunciation she had introduced in evidence. Technically it was possible for the court to give it the effect intended at the time by the remaining heir and she, in strict law, is without right to complain. When the account was homolo-

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gated in so far as not opposed, the claim of Mrs. Tassin remained in abeyance, and when subsequently her claim was rejected and her opposition was dismissed, to her renunciation was properly given effect. The heirs, it is now abundantly established, did not intend in any manner to waive anything.

Passing to the second account of administration filed by the executor as relates to acceptance of the succession by the Hymel heirs other than Mrs. Tassin, it is an approval of the first account and an affirmance of their acceptance, as we take it, of their acceptance as made evident, when the first account was homologated.

The account distributing the funds among the heirs as such are in effect partitions. The executor as an heir was unquestionably bound by his declaration that he, as an heir, was entitled to the amount declared to his credit, and the other heirs (parties to the account as heirs) were equally as emphatic, that they consented to the homologation of the account. There was a question of fact raised at bar, about the date of consent given by the heirs to the homologation of the last and final account. Granted, as to this date, that it is, as urged by the appellant, the homologation of the first account bound the heirs as having accepted.

“*Demandeur le partage dit Furgole, est de tous les actes d’heritier le plus expres; c’est l’exercice du droit hereditaire proprement dit, on ne peut pas etre copartageant sans etre heritier.*” Laurent, Vol. 6, Sec. 333, par. 3.

There is before us no question of error or the want of professional advice. When Mrs. Tassin renounced, she had a legal adviser who, presumably, advised her correctly and informed her of the effect of her renunciation upon her right as an heir.

It is, we think, proper to state that the legal adviser at the time the renunciation was made was not the counsel who represented her on appeal to this court. This completes the review of the question presented, and we find no ground upon which the appellant can be relieved. It only remains for us to affirm the judgment.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant’s costs.

No. 12,280.

STATE NATIONAL BANK VS. BRYANT & MATHERS.

49 467
105 95

1. A warehouseman who had received cotton on deposit from a factor issued his warehouse receipt for the same, deliverable to the depositor, or his order, only on surrender of the certificate. The factor, who had deposited the cotton in his own name in the warehouse, pledged the warehouse receipt to one of his own creditors. Certain parties claimed a portion of the property in the hands of the depository, alleging that the factor was without authority to pledge the cotton. The warehouseman called on the person who had made the deposit and the holders of the warehouse receipt that they might oppose the restitution, and judgment was rendered contradictorily between these parties, ordering the depository to surrender the cotton to the claimants. *Held*: That the delivery by the warehouseman to the claimants, under the judgment, protected him against any liability to the pledgee of the warehouse receipt. C. C. 2984.
2. A warehouseman issued a warehouse receipt for two hundred and twenty-five bales of cotton then actually in his warehouse, but without specification on the receipt of the particular bales of cotton received, deliverable only on surrender of the receipt, endorsed by the original holder. The depositor pledged this receipt to one of his creditors by endorsement of the receipt, and the pledgee gave immediate notice of the pledge to the warehouseman. The depositor, subsequently, deposited other cotton in the same warehouse, receiving a receipt for the same, also without designating the particular cotton covered by it. He then died. At the time of his death only seventy bales remained in the hands of the warehouseman, the balance having been delivered, under orders of court, to parties who had successfully claimed ownership and possession thereof. In a contest (for the balance of the cotton on hand) between the pledgee of the warehouse receipt and the administrator of the succession of the depositor—*Held*: that the former was entitled to recover the cotton. *Cutters vs. Baker*, 2 An. 572; *Williams vs. Piner*, 10 An. 277; *Oammach vs. Floyd*, 10 An. 351; *Connery vs. Webb*, 12 An. 272; *Newton vs. Gray*, 10 An. 67.

A PPEAL from the Civil Judicial District Court for the Parish of Orleans. *Théard, J.*

James McConnell for Plaintiff, Appellant.

Farrar, Leake & Lemle and *Chrétien & Suthon* for Public Administrator, Appellee:

The estate of Marx being insolvent the Public Administrator represents the creditors, and was a third person *quoad* the State National Bank.

No valid pledge has been proved as against the Public Administrator, who is a third person, he representing the creditors of S. E. Marx, his estate being insolvent. 14 An. 875; 15 An. 165; 32 An. 586; 31 An. 865; Art. 8158, Revised Civil Code.

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Where the possession of the pledgor is not sufficiently complete to prevent substitution, the pledge is not valid. 46 An. 1046; 96 U. S. 476.

E. W. Huntington and *H. L. Dufour* for Defendants, Appellees.

Argued and submitted December 5, 1896.

Opinion handed down January 4, 1897.

Rehearing refused February 1, 1897.

STATEMENT OF THE CASE.

Plaintiff alleges "that on the 12th day of January, 1894, Simon E. Marx, then a cotton factor in good commercial standing in this city, applied to the State National Bank for and obtained a loan of eight thousand dollars, giving as collateral security five negotiable warehouse receipts issued by the Louisiana Cotton Press, Bryant & Mathers, proprietors."

"These receipts were dated on the 11th day of January, 1894, and certified that the Louisiana Cotton Press had received from S. E. Marx (in the aggregate) two-hundred and twenty-five bales of cotton in their warehouse, marked as per margin ('marks various') 'to be delivered upon return of this receipt properly endorsed.'"

"The word 'negotiable' was stamped by Bryant & Mathers, in red ink, across the face of each certificate before they were issued. That these facts determined the commercial value of these certificates as collaterals, and rendered absolute the condition expressed on the face of the receipt, that the number of bales specified in each receipt would be 'delivered only upon the return of the receipt properly endorsed.'"

"The bank made this loan applied for by Mr. Marx solely on the credit of these five certificates. A pledge note, in the form usual in the banks, was then executed, in which the two hundred and twenty-five bales of cotton called for by the five receipts were pledged, and notice was on the same day sent to Bryant & Mathers that the bank held in pledge the five receipts, specifying the numbers and amounts. Ten days later, to-wit, on the 22d of January, 1894, Mr. Marx died. On the day after Marx' death a meeting of

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the board of directors of the bank was called and the matter was submitted to them for action, and apprehending that legal complications with the estate of Marx might arise from delay, the board adopted a resolution authorizing Mr. John M. Parker to demand, receive and sell the cotton." *

"On the 28d of January, at 8 o'clock P. M., Mr. John M. Parker proceeded to the Louisiana press, tendered the five certificates duly endorsed by S. E. Marx, and demanded the two hundred and twenty-five bales of cotton. To this demand the first reply of Mr. Mathers was that "as no marks were specified on these warehouse receipts, they did not know which cotton to deliver us," and subsequently a positive refusal was given."

"The refusal to deliver was made on the 28d, and the first seizure by any party claiming the cotton was not made until the 26th—three days after the refusal."

*Copy of note and act of pledge annexed to plaintiff's petition:

"NEW ORLEANS, January 12, 1894.

"On demand after date, I promise to pay to the State National Bank of New Orleans, or to the order of its cashier, at the banking house of said bank, in United States notes, National Bank notes or gold coin, eight thousand dollars, for value received, with interest at the rate of 7 per cent. per annum after date until paid. To secure this obligation and any other liabilities to said bank now existing or which may hereafter arise, I do hereby pledge to said State National Bank or its assigns, as collateral security for said note and other liabilities (225) two hundred and twenty-five bales cotton in Louisiana Press, and agree to give additional security to keep up the present margin whenever the market value of the above collateral should decline. And in the event of failure to make good such margin within twenty-four hours after notice so to do, or in the event of prompt payment of this note, according to its tenor, said bank or its president or cashier is hereby authorized to sell or cause to be sold, without the intervention of courts of justice, and without notice to me or the public, at public or private sale, at its or his option, all or any part of said collaterals, applying the net proceeds first to the payment of expenses incurred by said sale, to the discharge in part or whole of this note, any surplus to be applied at the option of the bank or its officers to the payment of any of my liabilities to said bank now existing, or which may hereafter arise. In case of deficiency I promise to pay said bank the amount thereof forthwith after such sale, with 8 per cent. interest. I hereby also agree that on failure to comply and pay said obligation as hereinabove stipulated, I shall by the mere act of said failure be adjudged to be in default without any demand or notice whatsoever. In case of a sale of collaterals, said State National Bank or the holder of any liability hereby secured may become the purchaser thereof without any right of redemption on my part.

"(Signed)

SIMON E. MARX."

The five warehouse receipts referred to are identical in form, all bearing date January 11, 1894. Four of them are receipts (each) for fifty bales of cotton, while the fifth is a receipt for twenty-five bales.

The following is a copy of one of the first four:

"Marks
and
number
of bales
various
50
bales.

(Signed)

No. 499. N. O., January 11, 1894.
Received from Simon E. Marx,
in our warehouse, fifty (50)
bales cotton marked as per margin,
to be delivered only upon the return of
this receipt properly endorsed.

Louisiana Cotton Press,
"BRYANT & MATHERS.

"Endorsement on back of receipt
"(Signed)

SIMON E. MARX."

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“Bryant & Mathers, having refused to comply with the obligation of their certificates, which was to deliver two hundred and twenty-five bales of cotton on return of the receipts properly endorsed, the bank brought suit to recover the damages sustained by their refusal.”

The answer of defendants sets up:

1. That in the course of business, Simon E. Marx at various times stored various lots of cotton in their press, and for the cotton so stored they issued at his request cotton press receipts certifying that they held a certain number of bales of cotton of various marks stored in their press by Marx.

2. That these receipts were similar in form and purport to those customarily issued by the various cotton presses of this city, and negotiated by the various banks, and particularly to those issued by the Louisiana Press to Simon E. Marx, and negotiated by the State National Bank.

3. That there were receipts outstanding for two hundred and seventy-five bales of cotton of various marks stored by Simon E. Marx, and there were two hundred and seventy-five bales of cotton to represent the same in defendants' press under defendants' control at the time of the issuance of said receipts, where they still are, with the exception of such bales as have been taken from defendants by judicial process in various suits to which the plaintiff bank was made a party, and in which it appeared.

4. That defendants were simply the custodians of the cotton, responsible in law for its retention until the receipts issued for the same were returned for cancellation, or the property was taken from them by judicial process, and they were not in law or justice guarantors of the title of Marx to the cotton.

5. That they admitted a demand was made by John M. Parker & Co. in behalf of the State National Bank, on January 23, 1894, for two hundred and twenty-five bales of cotton, and a tender was made by him of the five cotton press receipts sued on, but they denied that they refused to deliver any cotton.

6. That they averred the truth to be as follows: That they informed said Parker that they held in their press and under their control a number of bales of cotton, sufficient to cover all the cotton press receipts issued by them to Marx, but as Marx had not set aside a specific number of bales of special marks for each receipt, and

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there being no description of marks as usually given in such cases, accompanying the order for delivery and the receipts, defendants were without information as to the subject, and unable to point out what cotton was covered by the receipts, but offered to deliver said cotton when pointed out and identified by said State National Bank and said Parker.

7. That the fact was notorious and must have been known to plaintiff when said warehouse receipts were endorsed to them, that generally cotton factors in this city are not the owners of cotton stored by them in the presses of this city.

8. That by proper inquiry, plaintiff would have ascertained that Marx was not the owner of the cotton represented by the press receipts issued to him by Bryant & Mathers, and had no interest therein which authorized him to pledge same.

9. That plaintiff could have protected itself under the law providing for the issuance of cotton press receipts, by requiring before effecting a loan to him from Marx, proof of the ownership of the property pledged, and if any loss has fallen on said plaintiff, it was due to its failure to take the proper and prudent precautions in the premises.

10. That at no time during the life of Marx was any demand made by the bank to designate the specific marks of, or set aside the specific bales covered by each of the press receipts held by it, and had plaintiff made such a demand, defendants could have called on Simon E. Marx to designate and set aside the cotton covered by each receipt.

The succession of Simon E. Marx, the holder of a receipt for fifty bales of cotton of the two hundred and seventy-five bales stored at the Louisiana Press by him, and remaining there at the time of his death, was made a party to the suit, and answered by setting up the illegality of the pledge of the receipts to the plaintiff bank, and claiming the cotton.

There was judgment rejecting plaintiff's demand, and from that judgment this appeal has been taken.

The opinion of the court was delivered by

NICHOLLS, O. J. The defendants in this case are the proprietors of the Louisiana Press in the city of New Orleans, in which parties are

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in the habit of storing cotton for a consideration. Among their customers was one Simon E. Marx, who, during the season of 1893 and 1894, stored several thousands of bales in their warehouse. Marx died on the 22d of January, 1894. At the time of his death the State National Bank, plaintiffs herein, were the holders of the five receipts, signed by the defendants, which they annexed to their petition, in which they acknowledged that they had received from Marx two hundred and twenty-five bales of cotton, to be delivered only upon the return of the receipts properly endorsed, while the succession of Marx held a similar receipt for fifty bales. After Marx's death, plaintiffs made a demand upon the defendants to deliver to them two hundred and twenty-five bales of cotton, notifying them that if they did not do so they would hold them responsible for the value of the same. *The bank, immediately upon receiving the receipts, had notified defendants that they were the holders of the same under Marx' endorsement.* Defendants having failed to deliver, for the reasons assigned by them in their answer to plaintiffs' supplemental petition, the present suit was instituted. From the evidence it would appear that the cotton presses in New Orleans very frequently hold, for some length of time, cotton in store for their customers without issuing directly to them receipts for the same at all; that when they are called on so to do, the storer determines the wording of the receipts as well as the number of bales for which receipts are to be issued. The usual form of the receipt is that shown by this record, in which the marks upon the bales are referred to simply as being "various," modified, when requested so to do, by entering on the margin of the receipts the special marks which were on the articles stored at the time of storage. It frequently happens that outstanding receipts having been brought in and surrendered, new receipts are given either for a larger or smaller number of bales than those originally receipted for. It results from the facts above stated that the dates of the receipts do not fix with certainty the date of actual receipt of the different lots of cotton covered by them, nor do the outstanding receipts show, necessarily, the full quantity of cotton on storage at the date of their issuance. They do, however, recognize that the press has on storage for account of the storer, at the dates of these receipts, a number of bales equal to those receipted for. The custom in New Orleans seems to have been to deliver cotton from the presses, not by force of the surren-

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der of the receipts themselves, duly endorsed, but only when supplemented by a direct order from the storer accompanying the receipts on which the particular bales to be delivered were designated for the purpose of identification by the special marks upon them. The practice which has grown up, of leaving a portion of the stock in the warehouse entirely uncovered by receipts, while other portions are receipted for by receipts, in some instances specifying the precise marks upon the bales, and in others reciting in respect to the marks simply that they were "various," seems to have been adopted to give more freedom of action to storers in their commercial transactions than they would have if each lot of cotton was immediately receipted for as received by a receipt identifying the particular lot received by its special marks. The idea prevailing among the cotton press proprietors is, that so long as the outstanding receipts issued by them calls for only a given number of bales of cotton without specification of marks, their whole obligation consists in retaining in their hands a number of bales corresponding to that mentioned without regard to what particular bales are so retained—that the storer in spite of the issuing of the receipts by the press to him preserves full power of control as to the particular lots to be afterward delivered, by subsequently executing to them orders to deliver certain cotton specially designated in the order—in other words, that the holders of receipts for cotton wherein the cotton is referred to simply as cotton marked with "various" marks have but a floating or inchoate right which could attach only to the *residuum* (whatever it might be) remaining on hand after the special orders given by the storer had been exhausted, or until they themselves acquired fixed rights on an order from the storer designating specific cotton. They look upon a designation in the receipts themselves of the special marks which were upon the cotton receipted for or the subsequent designation or fixing of specific cotton by the storer in an order directed to them, coupled with a surrender of the receipt, as the exclusive means of identification of the bales falling under the operation of the receipts given, and they do not appreciate that any other condition of affairs should or could render them liable to holders of their receipts. The practice which we have alluded to is not only a very loose but a very dangerous one to all parties relying upon it. Under its operation as claimed, a factor having stored in a press several lots of cotton, part of which he could legally sell or

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pledge and part of which he could not legally pledge for his own debt, can leave a part of it unreceipted for and cause to be executed to himself special receipts for a limited number of bales, leaving their identity (so far as the receipts themselves are concerned) undetermined. He can then pledge these special receipts to a bank for a loan of money, but before the particular cotton to be covered by the receipts is fixed in favor of the bank or pledgee, he can sell the cotton which he was authorized to sell or pledge to a third person, and through the instrumentality of an order directed to the press, ordering them to deliver that specific cotton to parties named, he can withdraw it from the possession of the proprietors of the warehouse, and from the possible operation of the warehouse receipts, and drive the holders of the receipts into an unsuccessful litigation with the owners of the cotton still on hand (U. C. 1921, 1922). The lenders, in the end, will find themselves, unless, under exceptional circumstances, the holders of worthless pieces of paper. Even if matters in some given case did not go to the full extent here supposed, the lenders, under the operation of this loose practice, might be driven, in execution of their collaterals, upon a worthless grade of cotton; whereas, had they taken the simple precaution of causing the marks of specific cotton to be inserted in the receipts, they would have been amply protected. So long as business men elect to deal in this way, in order, by affording commercial facilities to their customers, to retain their business, they must not be surprised that they should occasionally be called upon to suffer loss.

The proprietors of warehouses, in following this same course of dealing, are also taking upon themselves risks which they evidently underrate. It is not essentially necessary to a liability on their part for cotton receipted for by them, either that the marks upon certain specific cotton should be inserted in the receipts, nor that the storer should by subsequent special order directed to them designate the particular cotton to be covered by their receipt. A certain condition of facts *dehors* the receipts themselves and *dehors* the direct order of the storer might, 'as between themselves and the holder of their receipts, fix a liability upon them. (*Id certum est*. C. C. 1917, 1918). We do not propose to enter into an examination of cases of possible responsibility on their part. One of the witnesses on the stand (Mr. Heyward) a cotton press

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proprietor, showed that he realized a very probable danger in a case supposed by himself. He said that if upon a given date he had a given receipt for two hundred and twenty-five bales of cotton "marks various," when the identical number and no more were then actually on hand, he would not permit the storer, who subsequently stored with him two hundred and twenty-five other bales, to draw out the first lot of cotton by special order, without the simultaneous surrender of the particular outstanding receipt which he had given. Under that condition of things he evidently considered the identity of the cotton covered by the receipt fixed by the facts of the case, and that under his own contract he would have to hold that particular cotton for the benefit of the holder of the receipt given, as the owner had lost control over it, and it was no longer subject to transfer by him or attachment or seizure by his creditors; that matters would stand as if without the receipt the storer had directed to them an order in favor of the bank to deliver to it the cotton in the warehouse on the 11th of January, and they had accepted the order. In this case not only had the warehouse receipts been endorsed by Marx, but the bank had immediately notified the defendants of the transfer or assignment of the receipts. Hennen's Digest, *verbo* "Attachment," page 135, No. 2, page 138, No. 1; page 139.

If, in the case thus assumed by the witness, there had been two outstanding receipts instead of one covering the exact number of bales then on hand, the fact that these receipts did not, on their face, specify any particular cotton, would complicate the situation between the two parties holding them; the difficulty, however, would be one of "evidence," and one claimant by having transferred to him the rights of the other could dispose of that trouble. In the absence of such transfer the holders of the two receipts would *prorate* the proceeds of the cotton, holding them against the claims of other parties.

We think the issue in this particular case a restricted one. Are the defendants liable to plaintiffs under the special state of facts shown? We think not. Plaintiffs claim through a pledge dated January 12, 1894, of receipts which call for no particular cotton. The most they can claim is, that the defendants should legally account for the cotton in store for account of Simon E. Marx on the 11th and 12th of January, 1894. Now of the number then on hand, two hun-

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dred and four bales have in suits, brought against these defendants, and to which plaintiffs were made parties, been decreed to have belonged to the plaintiffs in those suits. Defendants were ordered to deliver the same to the claimants, the court holding that Marx did not have possession under circumstances such as to justify or warrant his pledging the same.

The judgments in those cases bind the plaintiffs and conclusively relieve the defendants in respect to them. In calling the plaintiffs into those cases, defendants performed their duty. The defendants in receipting for the cotton did not warrant the title of the storer nor the circumstances of his possession. *Insurance Co. vs. Kiger*, 130 U. S. 352, 356.

Plaintiffs claim that there were one hundred and twenty-six bales of cotton in the press on the 11th and 12th of January, which Marx sold on the 11th and which defendants delivered on the 12th of January, 1894, to Townsend, Cowie & Co., under orders from the vendor, and that defendants, with knowledge of their outstanding receipts and that they had been pledged to them, should have held them for their benefit.

The evidence establishes that on the 11th of January, Marx sold one hundred and twenty-six bales of cotton to Townsend, Cowie & Co., then stored in defendants' warehouse; that at that time there were outstanding receipts in his hands which defendants had issued to him; that the latter declined to deliver the cotton to the vendee until these receipts should have been produced and surrendered; that Marx undertook to do so; that in anticipation of this being done on that day (the 11th), the receipts were drawn up, which plaintiffs now hold, which were to recognize the balance of cotton on hand after the delivery to Townsend, Cowie & Co. That Marx did not produce and surrender the receipts held by him until the 12th; that on their surrender on that day, the delivery of one hundred and twenty-six bales was made to his vendees, and thereafter the receipts, which had been dated on the day before upon the supposition that the outstanding receipts would have been then surrendered, were delivered to Marx, who having them, pledged them to the plaintiff bank. We think it was right and proper that the circumstances under which the new receipts were dated, as of the 11th instead of the 12th of January, should be shown. Plaintiffs' pledge bore date of the 12th, and there is nothing to show

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that they had any knowledge of the fact that Marx owned the cotton which was sold and delivered to Townsend, Cowie & Co., or that it was in defendants' warehouse. They did not act on the strength of that particular cotton, but relied upon the simple fact that, at the date of the receipts, defendants held in store for account of Marx two hundred and twenty-five bales of cotton. This quantity they did in fact have. When defendants issued the new receipts all outstanding receipts had been called in. Plaintiffs had no rights of any kind then in existence. When, on the 12th of January, Marx (after having received the new receipts) offered them for pledge to the plaintiffs, it was their duty, if it was their expectation or their wish to be protected by particular cotton, to insist upon the insertion of marks which would specifically designate it, or that the pledgor should give an order for delivery supplementing the uncertain description of the cotton received for. C. C. 1922, 1923.

Plaintiffs claim that if defendants had delivered to them when called upon to do so, the cotton which was subsequently declared to have been the property of the plaintiffs in the various suits and to have been illegally attempted to be pledged by Marx, the present complications would not have arisen; that they would have received and disposed of it. Defendants reply that they themselves were in danger in the premises and justified in taking the action they did, and that, even if plaintiffs had received the cotton and sold it, they would and should have been held legally liable to the actual owners for improperly converting to their own use property belonging to another person, and that the ultimate result, so far as plaintiffs were concerned, would be of no benefit to them. We think that defendants were justified in protecting themselves, and that plaintiffs' claims presented from the particular standpoint we are now considering, are without foundation. C. C. 2312.

After deducting the cotton on hand, which was sold and delivered to Townsend, Cowie & Co., and that which was decreed to belong to persons other than Marx, there remained in the possession of the defendants on the 12th of January, 1894, seventy-seven bales of cotton. The question is, as between the plaintiffs and the administrator of the succession of Marx, which is entitled to a judgment for its recovery.

The administrator of the succession of Marx claims them as holder of a receipt issued by defendants for fifty bales of cotton of "vari-

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ous marks" of a date later than the receipts held by the plaintiffs. Both claim under receipts not specifically describing the cotton referred to. With its delivery of this cotton the relations between the defendants and Marx will come to an end. Defendants stand indifferent as to whom it should be decreed. The lower court adjudged the property to defendant for general distribution.

Were Marx still alive and the present contest one between him and the plaintiffs, we think he could scarcely be permitted to come in competition with the creditor to whom he had assigned those press receipts. (*Salzman vs. His Creditors*, 2 Rob. 241; *Blood vs. Vollers*, 6 An. 785; *Neuton vs. Gray*, 10 An. 67). It is true that as between certain parties and under certain circumstances the want of specification of the precise property covered by the attempted pledge would result in the most serious consequences; but, as between Marx himself and the State National Bank, we think matters were in such a condition as would have forced him to recognize the rights of the bank over this remnant on hand. By the process of exhaustion and the force of circumstances it would have been demonstrated that the only cotton to which the receipts were applicable, and which he could legally pledge, was this particular cotton. He would be forced in order to give any effect to his contract to recognize the bank's rights.

The receipts as written, it is true, do not express in terms that defendants will deliver to Marx or his order two hundred and twenty-five bales of cotton on the surrender of the receipt. They declare that defendants have received that number of bales of cotton from Marx, which are deliverable only upon surrender of the receipt duly endorsed. It is by reason, we suppose, of the peculiar phraseology of the receipts that they have not been deemed sufficient of themselves and by themselves to call for a delivery, and that a special order from the storer has been required to be produced supplementing and to accompany them. We find that the defendants have written across the receipts the word "negotiable." Defendants contend that these words have no force or significance; that "negotiability" is a "legal result" of a fact only, and can not be brought about by stipulation or contract. We are, however, to consider whether, in placing that word upon the receipts, the defendants did not intend to contract to consider the receipts, as written, a promise on their part "to deliver to Marx or

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to his order," and carry those words practically and substantially into the receipts, even granting that these words, in addition to the endorsement of the storer of the goods, would be necessary to be inserted in the receipts to operate a transfer or assignment of the same. We think it was clearly the intention of the parties, either that the receipts themselves when endorsed in blank should import an order for the delivery of the cotton to the holder, or that Marx should subsequently give substantial order for delivery supplementing the receipts. If Marx were alive to-day, claiming the cotton as against the bank, we think he would be under a legal obligation to execute an order on the defendants for the delivery to the plaintiffs of the cotton now on hand; law and equity would call for his doing so, and "equity considers that done which should be done." *The bank had, before the death of Marx, notified defendants that it held their receipts for the cotton on hand on the 1st of January, 1894, under Marx's endorsement.*

But Marx having died, we are to consider the effect of that fact upon the rights and obligations of parties. The question now is whether, there being no parties claiming special fixed rights upon this remnant of cotton, either by way of purchase or privilege, and the contest being narrowed down between plaintiffs (holding under a pledge which might be imperfect in some respects as to certain parties and under certain circumstances) and the mass of ordinary creditors of the succession of Marx, represented by the administrator of that succession, the defect in the EVIDENCE of the pledge is to work any change in the situation from what it would have been were Marx alive, and he, and not his succession representative, were one of the contesting parties. We think it does not. *The ordinary creditors of a person*, in the absence of fraud, hold UNDER the rights of their debtor. Gardiner, judge, in *Candee vs. Lord*, 2 N. J. 269, declared that "in creating debts, or establishing the relations of debtor and creditor, the debtor is accountable to no one unless he acts *male fide*."

* * * The claims of other creditors upon the debtor's property are, through him and subject to all previous liens, preferences or conveyances made by him in good faith. Any deed, judgment or assurance of the debtor, so far at least as they CONCLUDE HIM, must ESTOP HIS CREDITORS and all others." This doctrine may be too broadly stated, but not too much so, in our opinion, for the purposes of this case. [*Succession of Nash*, 48 An., p. 1573; *Nicolopulo vs. Creditors*,

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87 An. 472; Webre vs. Beltran & Co., 47 An. 195; Baldwin, Recorder, vs. McDonald, 48 An. 1460.] We think the judgment of the District Court in rendering judgment in favor of the succession of Simon E. Marx, recognizing it to be the owner of the remnant of cotton (seventy-seven bales) now on storage in the Louisiana Press, stored therein by Simon E. Marx, and ordering its delivery by the defendants to the administrator of the succession of Simon E. Marx to be by him accounted for in due course of administration, is erroneous, except in so far as it recognizes the ownership of said cotton to be in the succession of Simon E. Marx—to that extent the judgment of the District Court in favor of the succession of Marx is correct, and it is hereby affirmed; beyond that it is annulled, avoided and reversed. Hepp vs. Glover, 15 La. 461; Deloach vs. Jones, 18 La. 447; Frazier vs. Wilcox, 4 R. 517; Marston vs. Deuberry, 15 An. 519.

For the reasons herein assigned, it is ordered, adjudged and decreed that the defendants do deliver to the plaintiffs the seventy-seven bales of cotton now on storage in their press, the Louisiana Press, which were therein stored by Simon E. Marx, the said cotton to be received and sold by the State National Bank and the proceeds applied by the bank as far as they extend to the payment of the promissory note of Simon E. Marx, of which it is the holder, for eight thousand dollars with interest thereon, which note was referred to in plaintiff's petition and filed in evidence herein—the court recognizing and decreeing that payment of said note stands secured as to its payment by pledge upon the cotton herein ordered to be delivered by defendants to the plaintiff.

In the event of the defendants, Bryant & Mathers, failing to make delivery to the plaintiffs, the State National Bank, of the cotton herein ordered to be delivered by them to said bank, it is ordered, adjudged and decreed that there be judgment in favor of the plaintiff, the State National Bank, and against the defendants, Bryant & Mathers, for the value of each bale of said cotton not delivered, the value of each bale being hereby fixed at forty dollars.

It is ordered, adjudged and decreed that the judgment appealed from in favor of the defendants, Bryant & Mathers, and against the plaintiff, the State National Bank, be and the same is hereby annulled, avoided and reversed, and judgment is hereby rendered in favor of the plaintiff bank against the defendants as hereinbefore decreed, with costs in both courts.

No. 12,385.

C. BRENT RICHARD VS. SOUTHERN BUILDING AND LOAN ASSOCIATION.

49	481
50	1119
49	481
111	887
4111	888

The contract by which a party becomes the owner of shares of the stock of a building and loan association to be paid for in instalments running through a long series of years, and borrows from the association on his stock, the interest on the loan being 6 per cent. per annum, is not to be treated as a usurious loan, the payments supposed to constitute the usury, by the terms of the contract being made on the stock debt, not the loan.

A PPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Read, J.*

Edward L. Wells for Plaintiff, Appellee.

Williams & Sugar and Carroll & Carroll for Defendant, Appellant.

Argued and submitted February 18, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the judgment maintaining in part the plaintiff's injunction to restrain the sale of his property under the executory process obtained by defendant on the plaintiff's note, secured by mortgage.

The case involves the contract of the plaintiff, a shareholder in the defendant corporation, and a borrower from it. As we gather from the record the outline of the character of these building and loan associations, the party seeking a loan becomes the owner of the shares of the association to an amount double the amount of the desired loan. In this case the loan sought was two thousand dollars, and the number of shares of which plaintiff became the owner was forty shares of one hundred dollars each, one of which, in the argument it is stated, he carries for the benefit of the company, and the other for his own. To secure a mortgage or vendor's lien for the note of the borrower, which is for an amount equal to the number of shares, in this case four thousand dollars, the borrower and shareholder transfers his property to the association, which transfers it back to him for his note corresponding with the amount

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of the shares, and thus besides the special mortgage the association gets the vendor's lien to secure the note. The borrower pays nothing for his stock at the time, but is required to pay a moderate amount, in this case seventy cents per month, on each share, giving a long period to pay for the stock, and as we understand it, the stockholder is to be credited also with the dividends anticipated from the profits of the association, which, of course, if realized, will lighten the payments and shorten the maturity of the stock. On the loan he makes no payments, except the interest at six per cent. Whenever the stock payments and dividends thereon equal the value of his shares, the stock and the loan are canceled. Failure to make the payments gives the right to forfeit the stock and makes the debt exigible, but when demanded before payment by the stock instalments, the stock is allowed a credit (in this case of one thousand six hundred and four dollars) in consideration of the liquidation of the loan earlier than contemplated, owing to the default of the shareholder in the payments required of him by the contract. In this case the shareholder defaulted after twenty-nine payments on his stock, and is in arrears for interest. He is credited in the petition for arrears of interest, and also with the sixteen hundred and four dollars, called the unearned premium, for the abridged period of the loan occasioned by his default, and in the briefs it is brought to our notice that his stock not forfeited will entitle him to its value, if claimed by him, and if not claimed, but kept in force by the required payments, will secure for him the benefits of a shareholder.

The petition of the association claimed the amount of the note with the stipulated interest from July 1, 1895, to which date interest is paid. The petition of plaintiff for the injunction alleged that he borrowed only two thousand dollars; was entitled to credit for two thousand dollars on the note; to the credit besides for his payment on the stock; admits an indebtedness of twelve hundred and eighty dollars, and claims damages for the dissolution of the writ of seizure and sale. The judgment of the lower court treated the transaction as a loan, maintained the injunction to the extent of six hundred and eighty-six dollars and fifty cents, allowing all payments on the stock as credit, and this appeal by defendant followed.

There is a motion to dismiss the appeal on the ground that the answer admitting an indebtedness of twelve hundred and eighty dollars, and the amount claimed in the petition being two thousand

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three hundred and ninety-six dollars that the controversy only as to the difference, is below the amount necessary to give this court jurisdiction. We find no brief in support of the motion and presume it is waived. The plaintiff's claim is for a sum in excess of our jurisdiction, and we see no reason to dismiss the appeal.

It is urged by the defendant that the transaction was a mere loan to him of two thousand dollars; that the excess of his note over that amount is not to be deemed a premium on the loan, hence is not demandable, and that all the payments, except those for interest, are to be imputed on the notes. This theory was adopted by the lower court. It is difficult to reconcile this defence with the contract in the record. A mere loan of two thousand dollars would not be linked with the transfer of forty shares of stock to the borrower, imposing the burden on him of payment, as well as entitling him to the benefits of a shareholder; nor would a single loan be accomplished with the stipulation that payment on the stock, with the dividends accruing on it, would cancel stock and loan. The plaintiff made the application for the loan with the distinct statement it was on his shares; that all payments by him, other than interest, were to be imputed to the stock; and the method of payment of loan and stock, and that default of these payments would mature the note, were well defined in the contract. The plaintiff received the two thousand dollars; has had the benefit of it at six per cent., along with the rights conferred on him as a shareholder. With these obligations imposed and the rights secured to him under the contract, he has evinced his own appreciation of the contract, and paid for a period the interest on the loan and the required payments on the stock. We can not, therefore, without disregarding the contract placed before us and the plaintiff's interpretation of it manifested by his acts, treat it as a mere loan on usurious interest, as alleged in the answer and contended in argument.

These building and loan contracts have been frequently considered by the courts of other States; the stipulations of the agreement between the association and the shareholders and borrower have been subject to careful analysis, and the mutual benefit of the shareholder and borrower, as well as the association, proposed to be secured has been exhibited as the prominent feature of the contract. With some contrariety of views, our appreciation is that the tendency of the decisions have been to sustain the contracts. Associations of this

 Duvernet vs. Railroad and Steamship Co.

character are viewed as formed to secure to the shareholders the privilege of borrowing on their stock; participating in the profits that may be derived, and at the same time extinguishing their obligations to the association by paying interest on the loans and by accruing dividends and small monthly payments on the stock. In a case before us recently the decisions of other States were reviewed, and we upheld the validity of the premium the shareholder was required to pay. *American Homestead Company vs. Linigan*, 46 An. 1119.

In accordance with the charter of the association the plaintiff is allowed a voluntary credit of sixteen hundred and four dollars. We are not enabled to appreciate on what basis this amount is adjusted, but no argument is addressed to us to show the credit should be greater. The plaintiff, treating his obligations as that of a borrower, insists his stock payments should be imputed on his loan. But under his contract the payments were on his stock, of which he remains owner with the right to obtain its withdrawal value. We find no basis to give the credits he claims.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and annulled, and it is now ordered, adjudged and decreed that plaintiff's injunction be dissolved; that defendant's writ of seizure and sale be reinstated, maintained of full force and executed, and that plaintiff pay costs.

 No. 12,380.

OSCAR AUGUSTE DUVERNET VS. MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY.

The passenger alighting from the train stopping at the meal station, attempting, under circumstances fully apprising him of the risk, to reach the eating house by passing so close to the baggage car while the baggage is being unloaded as to be injured by a trunk falling on his foot, has no claim for damages, though the passage he chooses to select is used by passengers, there being another path to the eating house as convenient and direct, free from all risk or obstruction, and provided by the company for passengers to reach the eating house.

APPPEAL from the Seventeenth Judicial District Court for the Parish of Lafayette. *DeBaillon, J.*

Orther C. Mouton for Plaintiff, Appellee.

Duvernet vs. Railroad and Steamship Co.

Leovy & Leovy and Garland & Dupré for Defendant, Appellant.

Submitted on briefs February 16, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues for damages for injuries caused by a heavy trunk falling on his foot from the baggage car of the defendant's train on which the plaintiff was a passenger. The defendant appeals from the judgment awarding plaintiff one thousand dollars.

The facts substantially are, that plaintiff, in undertaking to pass in front of the baggage car when the baggage was being unloaded at a railroad station, received the injury for which he claims damages. The passage on which the plaintiff was when the accident occurred is about ten feet; on one side was the train of cars, on the other the baggage room of the depot building, and in front of this room was the baggage car, with its open door to permit the unloading of the baggage; on this space between the baggage car and the baggage room, when the plaintiff attempted to pass, was a truck, a number of trunks, so occupying the narrow passage as hardly to leave room for any one to go by; as plaintiff approached the car porter, but a few feet in plaintiff's front, was in the act of moving away a trunk just unloaded, and the trunk that fell on plaintiff's foot was being shoved from the car, the plaintiff in his progress reaching the front of the car at the moment when the trunk in its descent struck his foot. The train had stopped at the station to afford the passengers the opportunity for a meal. The plaintiff's purpose in alighting from the train was to obtain letters he expected at that place, and to partake of the meal, for which fifteen minutes was allowed. The passage along which he walked led him to the place to get his letters, and also to a plank walk laid from the railroad track to the eating house, and it is in evidence that passengers used that passage to reach the eating house, though it led the plaintiff by the baggage car where the unloading of trunks was being effected. There was, however, another way provided by the company for passengers to reach the eating house; one of the witnesses calls it the regular path, and it is shown to be as convenient and direct as that the plaintiff chose to select.

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The argument for the plaintiff is in great part devoted to the proposition that the pathway on which he walked was used by the train passengers with the knowledge and assent of the company; that the path was connected with the plank walk leading to the eating house, and while there is some variance in the testimony, its general tendency is to show that the path selected by plaintiff was used as much as the other to reach the eating house, hence plaintiff contends he had the right to be there and to protection from the alleged imprudence of the company's employees in unloading the baggage car. The line of authority on which plaintiff relies is undoubtedly, to the effect that all portions of the railroad depot, permitted to be used as approaches, standing places or exits, the passenger is entitled to use for purposes incident to his travel. The text writers lay down the rule and our jurisprudence affirms it. *Hutchison on Carriers*, Sec. 561 *et seq.*; *Sullivan vs. Railroad Co.* 39 An. 800.

In our view, however, there is another principle that must exert controlling influence in our decision. The plaintiff knew the path he chose led by the baggage car from which the trunks had to be unloaded. It is true the company used no skids, but it does seem to us the plaintiff had the intimation of the process of unloading quite as effectively as that by skids projecting from the car. The impetus of the trunk derived from skids, if used, would have caused in all probability the trunk to come in contact with plaintiff's foot with greater force. There was the truck lying in front of the baggage car; the trunks already unloaded lying around obstructing the passage, provoking the remark of passengers like plaintiff attempting to go by, "there was no room, the trunks were in the way, they were loading and unloading;" the porter was a few feet in plaintiff's front removing a trunk just unloaded; the baggage car, with its open door plainly denoting the purpose, was on his left in full view, and as plaintiff in his approach came near, the employee was in the act of shoving the trunk that in its descent struck the plaintiff's foot. Giving due weight to the fact there was no one posted there to warn the approaching passenger, it seems to us the surroundings gave all the admonition any other warning could convey. Under all these circumstances the plaintiff continued his progress, passing so close to the car as to receive the falling trunk on his foot. We observe, too, that but a slight deflection on his part, had he paid any attention, to

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the right, would have saved him. The petition alleges the trunk was thrown from the car, but the testimony shows no such method, and it is clear to us, with ordinary care, the plaintiff could have come to no harm from that mode of unloading.

In this class of cases the law regards the conduct of the plaintiff in connection with the injury of which he complains. If imprudent himself, he can not recover unless his neglect is overshadowed by greater neglect or recklessness of the other party, so as to make it in legal contemplation the cause of the accident. We find no such relation of plaintiff's imprudence with that imputed to the defendant, when it is considered, too, that the defendant had provided another way to the eating house free from any obstruction or risk, as direct and convenient to the eating house as that plaintiff chose, though longer for that other purpose of plaintiff in alighting. We are constrained to hold the accident was due to plaintiff's imprudence in seeking under the circumstances to pass the baggage car, and because with the other perfectly safe way provided, he selected that attended with the risk he encountered and from which he suffered. Wharton on Negligence, Sec. 361; Johnson vs. Canal & Claiborne Railroad Company, 27 An. 53-54.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and annulled, and it is further ordered and adjudged that plaintiff's suit be dismissed with costs.

No. 12,303.

PAUL LECOURT VS. D. S. GASTER, SUPERINTENDENT OF
POLICE, ET ALS.

An injunction will not issue to restrain the execution of a criminal statute.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

49	487
107	413
49	487
117	710
49	487
118	233

E. A. O'Sullivan for Plaintiff, Appellant.

Samuel L. Gilmore, City Attorney, for Defendant, Appellee.

Argued and submitted March 4, 1897.

Opinion handed down March 15, 1897.

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The opinion of the court was delivered by

WATKINS, J. The plaintiff alleges that he is a licensed restaurant keeper and retailer of spirituous, vinous and malt liquors, doing business at West End, a place of resort for recreation and health much frequented by the citizens of New Orleans; that he conducts his establishment in an orderly and peaceful manner, and in strict accordance with police regulations.

That he has been informed and believes that it is the intention of the defendant to enforce against him on Sundays the provisions of Act 18 of 1886, known as the Sunday law, and that in the enforcement of said law he (defendant) proposes to close up his said establishment and thus interfere with his constitutional right of carrying on his business. That his aforesaid business is lawful and recognized as such by laws of the State and city, and that said act especially exempts localities such as that at which his business is being prosecuted from its operation and effect.

For the foregoing reasons plaintiff sought and prayed for a writ of injunction to prevent the defendant from closing his establishment as proposed.

To this petition the defendant tendered as a peremptory exception the want of jurisdiction of the District Court *ratione materiæ et personæ*, and same having been sustained by the judge *a quo* and the order of injunction refused, the plaintiff prosecutes this appeal.

In the course of his reasons for refusing the order the judge said the case involved an interpretation of the Sunday law, and same was beyond the jurisdiction of a court of civil jurisdiction exclusively.

In State *ex rel.* City of New Orleans vs. Judge, 48 An. 1448, a similar question was raised and decided and in the course of our opinion we said:

"Act No. 18 of 1886 is a criminal statute. The duty was imposed upon relator (defendant here) to see that the statute was executed. It was his duty to arrest all offenders against that statute. No court has the power by injunction to restrain the execution of a criminal statute. But the respondent judge says the law does not apply to the plaintiff in injunction. This is placing an interpretation upon a criminal statute that is within the jurisdiction of the Criminal Court.

"In the case of Hottinger vs. City, 42 An. 680, it was said the courts of this State have no power to issue an injunction to prevent a

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municipal corporation from enforcing, by authorized judicial process, its police ordinances, penal in their nature, enacted for the promotion of the public health.

“Much stronger, therefore, is the reason that no court can enjoin the execution of a criminal law of the State, or the officers upon whom devolves the duty, from enforcing obedience to the law.”

The instant case can not be distinguished from that one; and we adhere to the opinion and ruling therein.

Judgment affirmed.

No. 12,878.

LOUIS GRUNEWALD VS. COMMERCIAL SOAP, STARCH AND CANDLE
MANUFACTORY, LIMITED.

49	489
50	1292
49	489
113	359

The blank in the authentic act in which the amount of the debt is repeated will not vitiate the act, there being the explicit statement of the debt in the previous part of the act with the usual confession of judgment.

When the plaintiff is the holder of all the obligations, matured and unmatured, of the mortgage debt, and under the stipulations in the act sues for the entire debt, the five per cent. attorney's fees stipulated in the act, may be included in the writ as part of the costs to be paid from the proceeds of the mortgaged property.

Insurance premiums may also be included in the order, when the amount is not in excess of the amount allowed in the act.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Dinkelspiel & Hart for Plaintiff, Appellee.

W. S. Benedict for Defendant, Appellant.

Argued and submitted March 3, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal from an order of seizure and sale.

The writ issued on a petition claiming that the property be sold to pay the attorney's fees on the full amount of the mortgage bonds, ten thousand dollars and interest, five per cent. attorney's fees

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on the full amount of the debt and interest due being stipulated in the act, two hundred dollars for insurance premiums, and the amount of the past due coupons three hundred dollars, the purchaser to assume up to the amount of his bid, the bonds not due secured by the mortgage.

The errors assigned by the defendants are that the petition, bonds and coupons do not authorize the order; that the order for the payment of five per cent. attorney's fees on the full amount of the bonds, ten thousand dollars past due coupons and interest, is not authorized by the authentic act, and that the order for payment of two hundred dollars, part reimbursement of premiums, is not supported by authentic evidence.

When mortgage notes, secured by the same mortgage, are held by different parties, the suit on one or more does not authorize the imposition of the *per centum* of the attorney's fees on the whole amount of the debt, but only on the amount sued on by plaintiff. If it were otherwise the five per cent. might be claimed in every suit brought by different holders; but in this case, notwithstanding the imperfect record brought up by the appellant, it is apparent the plaintiff held all the bonds and coupons representing the entire debt, ten thousand dollars, and under the stipulations of the act he brings the suit to sell the property for the whole debt. We think, therefore, the five per cent. fee can be claimed on the full amount of the mortgage debt.

In respect to the insurance premiums, the act stipulates their payment up to two hundred dollars for payment out of the proceeds of mortgaged property. With that stipulation, the writ (not in the record however, but we presume followed the order), properly directed the payment of two hundred dollars for insurance premiums.

We are of opinion that the assignments of error to which our attention have been directed in the argument furnish no basis for us to set aside the order of the lower court.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs.

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No. 12,297.

W. R. NELSON VS. CRESCENT CITY RAILROAD CO.

Under our jurisprudence it is not essential in a suit against a corporation for damages caused by its agent, to aver that the corporation had the power to prevent the act of the agent and failed to do so. Civil Code, Art. 2315, 2320, Hart vs. Railroad Co., 1 Rob. 181; 27 An. 716; 37 An. 654.

If, with due attention the motorman of a street car could and should have perceived a child of tender age, on or straying near the track, under circumstances indicating the great danger of the child, the motorman should seasonably use the preventive means to avert the accident and his failure in that respect resulting in injury to the child will make the railroad company liable for the injury.

49 491
50 204
51 114

49 491
4104 201
49 491
105 427
1105 676

49 491
107 701
49 491
111 543

49 491
116 473
117 261

APPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

49 491
125 110
125 1100

Fenner, Henderson & Fenner for Plaintiff, Appellee.

Farrar, Jonas & Kruttschnitt and *Thomas J. Semmes* for Defendants, Appellants.

Argued and submitted January 7, 1897.

Opinion handed down February 15, 1897.

Rehearing refused March 29, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues for damages for injuries to his minor child struck by an electric car of defendant, thrown to the ground, and the wheels of the car passing over the legs of the child, rendering necessary the amputation of both, the petition charging that the accident was due solely to the gross carelessness of the defendant's agent, the motorman. The defendant's answer denies the imputed negligence, and alleges the accident was due solely to the fault and negligence of the child and its parents. Thereafter the defendant excepted that the petition disclosed no cause of action, which overruled, the case was submitted to the jury, and from the judgment based on their verdict against defendant for thirty thousand dollars, this appeal is prosecuted.

It is urged that the petition, containing no averment that the defendant could have prevented the act causing the damage, dis-

closes no cause of action. Civil Code, Arts. 2320, 2315, 2317. In the Napoleon Code the exemption relied on by defendant is denied to masters and confined to parents, teachers and artisans sought to be held for acts causing damage committed by children and apprentices in their charge. Napoleon Code, Art. 1384. The commentators on that Code maintain that masters must be deemed able, by selecting careful servants, to avoid all damages arising from their acts, and hence the French jurists reach the conclusion that inability to prevent the act can not be urged by masters when sought to be made liable for damages caused by their servants. Boilleaux thus states this view: "Ces derniers," referring to masters, "ne s'affranchiraient donc point de l'obligation pèse sur eux, en offrant de pouvoir qu'ils n'ont pu empêcher le dommage; la loi les assujettit à la responsabilité la plus entière, ils doivent s'imputer d'avoir pris à leur service des gens méchant, maladroît, imprudents ou dont ils ne connaissent par le moralité." 4 Boilleaux, p. 765; 2 Mourlin, p. 890.

The framers of our Code, however, have extended this exemption given by the Napoleon Code so as to give masters the same defence of inability to prevent the wrongful act of their servants, given by the Napoleon Code to parents, teachers and artisans. Civil Code, articles cited. But when a corporation is the employer, and is sued for the wrongful act of its agent, is not the failure of the corporation to exert its power of prevention, manifested by the act itself of the imprudent agent, whose act is that of the principal capable of acting only through its agents? The prevention the Code exacts, and the exercise of which it makes a shield for the employer against liability for his servant's acts, is obvious in its application to natural persons. But if the corporation acting only through agents, is to be exempted from liability for its agent's acts, on the theory that some preventive power must be shown beyond the selection of the incompetent agent, it would follow that no corporation could be made liable. The theory, in other words, would seem to exclude liability of corporations from that responsibility for the neglect and imprudence of its servants imposed by the laws on all masters.

The question raised by the exception of defendant is not new in our jurisprudence. In suits against individuals asserting their liability for acts of their agents, our courts have applied the exemption from responsibility unless there was averment and proof the

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principal could and did not prevent the act; there are decisions exacting the same requirement to hold corporations, while in other, and especially the decisions of later years, the responsibility of the principal has been determined with no reference to averment or proof on this point. *Palfrey vs. Kerr*, 8 N. S. 504; *Strawbridge vs. Turner & Woodruff*, 8 La. 537; *Buel vs. New York Steamer*, 17 La. 545; *Collingsworth vs. Covington*, 2 An. 406; *Fitzgerald vs. Ferguson*, 11 An. 396; *Poree vs. Cannon*, 14 An. 506. But even in the earlier decisions applying the exemption of the master's liability for the servant's act, the distinction has been recognized between the principal, a natural person, and the corporate principal. Judge Martin dealing with the charge of the lower court to the effect that this qualification of the master's liability in Art. 2299 of the old, now 2819 of the new Code, had no application to a corporation capable of acting only through its agents, and that part of the Code had been inserted inadvertently, sustained the charge, though not of the opinion the article had found its way into the Code by inadvertence. *Marlatt vs. Levee Steam Cotton Press Company*, 10 La. 586. In another case of similar character, this court, dealing with this part of our Code, observed it was calculated to do away with the responsibility of corporations, still was our law, but the corporation was absolved from liability on the ground that the act of its agent was a crime, and of course not within the scope of the functions entrusted to him. *Ware vs. Barataria and Lafourche Canal*, 15 La. 169. In *Hart vs. New Orleans & Carrollton Railroad Company*, 1 Rob. 181, this court held the lower court properly refused the charge that the master could not be held for the servant's act resulting in injury, without proof the master could have prevented the act and failed to do so. In *McCubbin vs. Hastings*, 27 An. 716, and *Van Amburg vs. Railroad Company*, 37 An. 654, the last being a suit against a corporation, the exemption of the master's liability under consideration here was discussed and limited. In the long line of decisions since the Hart case, the principle of that decision has been followed through without discussion, except that bestowed on it in the McCubbin case, 27 An. 716, and the Van Amburg case, 37 An. 654. The reason the French jurists assign for denying to masters the exemption from liability accorded in our Code, that they must be presumed able to select competent agents, suggests that the ability to prevent the wrongful act of the servant is to be

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deemed implied when the master is sought to be held for such acts. Whether guided by the reason of the French commentators or on the theory that the act of the corporate agent is to be regarded as that of the corporation, our jurisprudence, it seems to us, dispenses with the express averment in suits of this character that the corporation could have prevented the act of its agent and failed to exert that prevention.

The defendant claims that the testimony produced by plaintiff should have been excluded because containing no allegation that the child or those having him in charge did not contribute to the accident. On this point, we think the age of the child, and that he strayed from the banquette, stated in the petition, dispensed with greater particularity of statement. The petition alleging the accident was due solely to the gross carelessness and want of care and skill of defendant's agent, in our view, is a sufficient averment in that respect. Besides, the defendant claims the allegations of the petition are lacking in precision and fullness in regard to the manner of the collision; the relative position of the child and the car; because "the speed" of the child crossing the street and the car, are not given, nor the lack of proper signals or apparatus, is not charged, and other deficiencies are suggested. The petition avers the time, the place of the accident, that the child was run down by the car, his legs crushed by the wheels, and this was due solely to the carelessness of the motorman. There was no call for any greater detail of statement, but defendant joined issue. Under our system of pleading requiring a concise statement of the cause of action, we think the petition was sufficient, especially as no exception to the form of its statements was interposed.

The accident occurred on an evening in June, about 7:30 P. M. The car that struck the child, descending Magazine street, was of the kind called the "summer car," with steps on either side and seats ranged across the car. On that street, the width of which is thirty feet, there are the ascending and descending tracks; the descending track being nearest to the right, or river side of the street. The child had been playing on the banquette on the left, or wood side, and at or near the lower corner of Constantinople street. Leaving the banquette in his course to the opposite side, the child had strayed to a point in the street close to the line of rails nearest the wood side of the street of the descending track, and about ten feet

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below the lower bridge or crossing from one to the other side of Constantinople street. At that point the child came in contact with the side step, near the front of the descending car, was thrown to the ground, his legs drawn under the wheels on the left side of the car, and crushed so as to require the amputation of both, the car running at its usual speed and going about a length beyond the spot of contact before its motion was arrested.

The defendant has produced the testimony of passengers in the car at the time of the accident, some seated on the side of the car where the accident occurred. From these witnesses, or those that could see we have the statement the child coming out from the wood side ran into the car; one testifies she saw him run into the side of the car, and felt, to use her words, as if she could stoop and pick him up. All these witnesses speak to the promptitude with which the motorman applied the brake and brought the car to rest in, say, forty feet from the lower crossing of Constantinople street. Passengers, even if seated so as to see ahead, are not apt to bestow attention on objects near the tracks in their front. The witnesses testify to the preventive measures to stop the car, but this prevention was exerted when their attention was attracted by the cry of the motorman, an alarm, however, not given, and hence could not have been heard until the car was close to the child, we conclude about the upper crossing, and the child was struck, say, ten feet from the lower crossing. That the application of the brake was too late to avert the accident is demonstrated by the accident itself, and the fact the car went about its length beyond the point of contact. The passenger testimony does not, in our view, materially aid in the solution of the important question whether before the brake was applied the child should not have been perceived, and in time to spare him. Another witness for the defence testifies his attention was first attracted by hearing "Look out for the child!" The witness looked up and saw the child coming out near the second post below the corner; he ran out just below the crossing, when witness first saw the child; he was across the gutter and in the street; he kept going up and ran against the side step of the car. We conclude it was the cry of the motorman to which the witness refers, and that when the attention of the witness was thus attracted, the car was then about the upper crossing, the point, too, where the motorman puts the car when the child was first perceived. This

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witness was seated on the steps of his residence about one hundred and fifty feet below Constantinople street, on the river side of Magazine street, and his opportunity of observation was the space, or rather moment between the cry that called his attention and the quickly succeeding contact; his view, too, was soon shut off by the car in its motion intervening between the witness and the child thrown down on the side of the car furthest from where the witness was seated. The motorman's account is, in substance, the car was about the upper crossing when he first saw the child; that he hallooed to a woman on the banquette come and take or catch that child, the witness' hand then on his reverse and brake; that the child made a "bulge" right across the street and hit the car on the step, and the witness locates the child about ten feet below lower crossing. Another witness for the defendant was on the river side of Magazine street, about fifteen feet from the Constantinople corner, watching the children playing on the opposite banquette; he testifies he saw the child leave the second post from the corner and "shoot" across the street; the car, the witness states, was then crossing Constantinople street with its fender on the down side, and he puts the child about twenty or thirty feet below the lower crossing; the witness was at once impressed with the child's danger when he saw him "shoot" across the street, the car so close at hand. The witness, we think, is mistaken in the distance he puts the child below the crossing. In another aspect his observation strikes us as inaccurate. He puts the car fender on the lower crossing when he saw the child "shoot across the street." A swift moving car, not called for any passenger to stop on the corner, moves through ten or even twenty feet in an almost unappreciable point of time. The witness' theory assumes that a two-year-old child, in that instant of time, could traverse say fifteen feet from the post on the banquette to where he was struck just outside the descending rail. The statement is, in our view at least, improbable. It must have been the mere glance on which the witness relies to state the relative position of the child and the car. His testimony would convey the inference the child could not have been seen, or that his movements not begun until the fender was on the lower crossing. But the concurrent testimony of the passengers when the motorman gave the alarm and his own testimony is that the car was on or about the upper crossing when the child was first perceived. There

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is other testimony for the defendant, not presenting, however, any phase materially different from that indicated by the motorman and the witnesses whose statements we have condensed as of leading importance.

The plaintiff has produced the testimony of three witnesses, present at the time of the accident, one of whom, with greater particularity, testifies in effect, he observed the conduct of the motorman before he reached the corner of Constantinople street, say one hundred feet above that street; that his attention was not directed to the track in front until the car had gone nearly fifty feet beyond where witness first observed him; that witness heard him halloo and throw up his hands as if agitated; witness then looked for the cause of the motorman's halloo, and perceived the child coming across the street walking very slow, and he puts the child below Constantinople street, about twenty-five feet. The witness further testifies the motorman did not apply his brake promptly after his halloo, and places the distance from the point of the halloo to where the child was struck at sixty-two feet. The two other witnesses, observing the transaction from the same point as the first witness, gave confirmatory testimony. The deep significance of this testimony against defendant is obvious. It puts the child approaching the track close to which it was struck in full view of the motorman before he reached Constantinople street, and in ample time to stop the car, and the testimony places on him the responsibility for using no preventive means to arrest the car until he had gone the distance stated by the witness, with the result of striking the child sixty feet from the time his presence near the track or crossing the street was perceived by the motorman and aroused his alarm. The testimony has been assailed. The reason given by the witness for close observation of a motorman has been questioned. His statement of the conduct of the motorman hallooing and throwing up his hands has been contrasted with the testimony of the car passengers to his prompt action. The distance of the car from the child; that traversed by the car after the child was struck, the movement of the child and other particulars stated by the witness, it is urged on us are materially variant from the indisputable facts and the other testimony. It is insisted the testimony shows the witness was not in the position he indicates in describing the accident; that he introduced the child's father to counsel, and, in other modes,

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aided the prosecution of this suit, all of which, it is contended, militates against his testimony. To all this urged in depreciation of the testimony we have given attention. We think the witness accounts for the notice of the motorman's movements, and we can not assume the cause he assigns, is fabricated. In connection with the variance of the witness' testimony and that of the car passengers to the conduct of the motorman, it weighs with us that the witness and the two others were in the motorman's front and the car passengers behind him; the attention of the passengers was attracted by the motorman's halloo; these witnesses for plaintiff state their observation preceded that alarm given by him. There is a discrepancy of the testimony of these witnesses for plaintiff and the other testimony as to distances, the movement of the child and in other respects, but witnesses with equal opportunities of observation are apt to differ as to such details, and yet be truthful in purpose. Between the witness' statement he was present and the contradiction on that point from one of the defence witnesses he was not, we must, it seems to us, adopt the affirmative statement. An eye-witness of a railroad accident injuring the child, due as the witness thinks to the carelessness of the motorman, is apt to have his sympathies enlisted and his interest aroused in the prosecution of a suit brought for the child. The part taken by the witness, in connection with or in aid of this litigation, does not, in our view, do more than create, perhaps, a partisanship for the side on which the sympathy of the witness exists, and that possible bias we have considered in connection with the testimony. But these witnesses stand before us, as they did in the lower court, unimpeached for veracity, the judge of the lower court taking occasion to declare his conviction of the failure of the attack on the testimony. Their testimony must, therefore, have the weight before us, with due allowance for variances in details, and attaching appropriate weight to the testimony in substantial respects.

There is besides the testimony of four persons seated on a bench on the lower side of Constantinople street in a position to see the child and the approaching car, at least, from the moment it appeared at or near the upper crossing of Constantinople street. The scream of a girl on the corner first attracted their attention. One of these witnesses testifies in effect, he turned at the scream, saw the child crossing the track, the dash-board of the car coming round (or to) the corner, the child was on the crossing, but along with this last

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statement, is that the child was picked up ten feet from the crossing. Another testifies, in effect the child was in the street crossing, and in another place, in between the tracks and the car just coming from the up-town corner, but on a previous occasion he had stated the car was five feet away; another testified in effect, he saw the little one go (or walk) across the track, in another place he puts the child between the tracks, at that moment the car close by, he does say sixty or seventy feet away, but this is manifestly a mistake, as, in our opinion, from the witness' position he could not have seen the car at that distance; another of these bench witnesses states in substance, when the scream attracted his attention the car was on the up-town side, the child below the plank walk or bridge just about on a line with the property line, or three feet below, with the car in the position stated by him, the child was in between the tracks, the child looked back at the scream. There are other witnesses who testify to the course of the child, the point it had reached and the position of the car at the upper crossing. In our examination of the testimony, quite voluminous, we have been guided by its general bearing irrespective of minor variances and have applied by the correction afforded by the facts. The substantial concurrence of these bench witnesses is that the child was in the street on its course to the opposite side when they first saw him, and their testimony, we think, establishes with reasonable certainty he had neared, if not reached, the spot where he was struck, when the car was at the upper crossing. If the child had made that progress when the car reached the upper crossing there is an obvious support to that testimony which puts the child in the street before the car had reached that crossing. If so there is no satisfactory answer why he was not seen and the brake applied before the motorman states he first saw the child. Again, if the child had gone as far as indicated by the bench witnesses, at the moment the car reached the upper crossing, it is fatal to the theory of the sudden bulge across the street when the motorman on the upper corner first saw the child, and certainly leaves no room to suppose the child left the second post and "shot across" the street when the fender of the car was on the lower crossing. To our minds the testimony carries a persuasion difficult to resist that the child was in the street at or close to the spot he was struck before the motorman saw him, and our conviction based on the

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whole testimony is that the child could and should have been seen by the motorman in time to avert the accident. The presence of a child of tender years within the plain view of the motorman, on or approaching the tracks under circumstances indicating the great danger of the child, imposes on the motorman the duty of prompt preventive measures to save the child. We have indicated our conclusions of the failure of this duty.

The case comes to us fortified by the verdict of the jury and accompanied with the opinion of the judge of the lower court refusing the new trial, evincing his careful consideration and conclusion that defendant is liable. The record exhibits questions of the credibility of witnesses and the weight of evidence, the solution of which is presumed to be aided by the better opportunities of the jury and judge before whom the witnesses testify. While this court has felt constrained in many cases to set aside verdicts manifestly erroneous and oppressive, still, in cases like this, it has been the rule not to disturb verdicts supported by the opinion of the lower judge, merely because of the conflict of testimony, or unless the verdict is palpably wrong. In view of the importance of the case and the earnestness with which it has been argued, we have not felt at liberty to rest on the weight due in a case of this peculiar character to the verdict or the opinion of the District Judge. The case has received, at our hands, the most careful consideration, and our appreciation is, that the judgment of the lower court, except as to amount, must stand.

The damages for an injury to the child deprived by the act of defendant's agent of both legs should be proportioned to his sufferings, and to that helplessness or dependence to which he is reduced and must endure to the end of his yet young life. As in all cases of damages for the loss of life or limbs, the measure of damages is a subject of difficult appreciation. We have considered the cases cited by defendant, and with an earnest desire to award suitable compensation, without oppression to the principal called on to answer for an agent's acts, we have reached the conclusion the judgment should be reduced to twenty thousand dollars.

In *Ketchum vs. Railroad Company*, 38 An. 778, for the loss of an arm this court allowed ten thousand dollars damages. In *Peniston vs. Railway Company*, 34 An. 777, for broken leg, six thousand dollars. In *Barksdull vs. Railway Company*, 23 An. 180, for both legs, fifteen

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thousand dollars. In other cases of injuries, far inferior in character, allowances have ranged from fifteen hundred to seventy-five hundred dollars. In *Choppin vs. Railway Company* twenty-five thousand dollars was allowed for the loss of leg. In the Federal courts, for an injured foot, seventy-five hundred dollars was allowed; ten thousand dollars in another case was awarded for the loss of a leg, and in another case twenty thousand dollars were given for the loss of both legs. *Railway Company vs. Stout*, 17 Wall. 657; *Railroad Company vs. Mares*, 128 U. S. 710; *Railway Company vs. Herbert*, 116 U. S. 642. Guided by the circumstances of this case, and in the light of cases of injuries to limbs, it seems to us the damages we give can not be deemed excessive.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed that the plaintiff, W. R. Nelson, for the use of his minor child, recover of the defendant, the Crescent City Railroad Company, twenty thousand dollars and costs.

DISSENTING OPINION.

BREAUX, J. In view of the many decisions of this court, allowing amounts considerably less in suits *part materix*, I am of the opinion that the amount allowed in this case is excessive, and therefore, as relates to the amount, I dissent from the decree.

No. 12,213.

IN THE MATTER OF LEEDS & CO., LIMITED, IN LIQUIDATION.
OPPOSITION TO PROVISIONAL ACCOUNT OF RECEIVERS AND
LIQUIDATING COMMISSIONERS.

49	501
104	41
49	501
113	290

Liquidating commissioners of a defunct corporation have no standing in court to contest the legality of the acts of copartnerships upon which it is founded, whose assets it took possession of, and whose indebtedness it assumed and promised to pay.

When, in the course of the dealings and business of a commercial partnership, accounts with its customers are periodically cast up and stated, and interest at the rate of eight per cent. is computed upon such balances as may be found due, and carried into future settlements as part of the capital, the receivers of a subsequently organized corporation into which each partnership has been merged has no right of action to overhaul same upon a claim that usurious interest has been charged.

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This is not the ordinary case of a debtor resisting the demand of a creditor upon the ground that he has been charged usurious interest, but that of liquidating commissioners of an insolvent corporation seeking to avoid *acts* of partnership while it was in operation, as well as those of the corporation itself while it was a going concern, upon the theory that same were prejudicial to the interests of ordinary creditors of the corporation whom they chose to recognize, and whose rights they have undertaken to champion, in opposition to others who are creditors of the corporation, and were, for many years previous, creditors of the partnership.

A case thus circumstanced must be regarded as standing in an attitude before the court somewhat like that of a revocatory action.

The Code declares, that if any one shall pay a higher rate of interest than five per cent. per annum, he may sue for and recover the same back within twelve months from the time of such payment, and that declaration clearly signifies that the legislative purpose was to bring such a right of action within the shortest reasonable limit, as a means of discouraging same as far as it was practicable, and of compelling a resort to this method of relief while the transactions were of recent origin, and proof of them within easy reach.

Within the intendment of the declaration of the Civil Code, Art. 2924, that the rate of eight per centum "must be fixed in writing," we do not consider it even a doubtful proposition, that a debtor and creditor may deal with their accounts as they choose, and compute and carry into a settlement thereof any amount of interest they please—the only restraint it places upon the *contracting* power of parties being, that they shall not stipulate for the payment of more than *eight per cent. after maturity*.

When, in the liquidation and settlement of a commercial partnership its assets and property are regularly transmitted to a corporation which assumes all partnership liabilities, the liquidating commissioners of the corporation can not evade the legal effect of same upon the ground that the transaction was a nullity, because one of the members of the partnership and one of the stockholders of the corporation was the husband of one of the principal creditors of both.

It is elementary that the mere acceptance and personal use of the wife's funds creates an indebtedness in her favor and against her husband, and that the husband being legally capacitated to administer his wife's paraphernal property, he is competent to administer same as mandatory, and without any formal power of attorney, the husband's management of his wife's affairs being regarded as sufficient, if known to and acquiesced in by her.

In the instant case the wife's paraphernal funds having first gone into the partnership of which her husband was a member, and afterward into the corporation of which he was and is a shareholder, and been used in their business, several important consequences flow from their transactions, *viz.*:

First—The establishment of the debt of the husband to the wife, he being a stockholder in the corporation, and having been a member of the different partnerships previously.

Second—That said indebtedness remains absolutely imprescriptible in so far as the husband is concerned, so long as the marriage exists, between him and his wife as the creditor, notwithstanding the latter be judicially separated from him.

Third—That same being the indebtedness of a commercial partnership, every member of same becomes liable therefor *in solido*.

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Fourth—That acknowledgment of one debt or *in solido* legally interrupts prescription as to all others.

Fifth—That Charles J. Leeds became personally bound by all the legal acts which were done by the partnerships of which he was a member; and he, likewise, became bound by the lawful act of the corporation of which he was a shareholder, in assuming and contracting to pay the same.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Benjamin Rice Forman and Hugh C. Cage for Receivers and Unsecured Creditors, Appellants.

W. S. Benedict for Beattie Heirs; *B. K. Miller* for Canal Bank; *Carroll & Carroll* for Mrs. Charles J. Leeds, Mrs. Sarah A. Leeds, Miss Helen Leeds and *Carroll & Carroll*, Opponents, Appellees.

Argued and submitted December 16, 1897.

Opinion handed down February 1, 1897.

Rehearing refused March 29, 1897.

The opinion of the court was delivered by

WATKINS, J. The account of the liquidating commissioners proposes for distribution among certain creditors thereon enumerated the sum of twenty-five thousand and seventy-two dollars and eighty-three cents, the total amount of the claims of acknowledged creditors being fifty-three thousand nine hundred and three dollars and twenty-three cents, on which a pro rata distributive share is to be paid.

At the foot of the account is placed the following statement, as a memorandum, to-wit:

"The following claims are on the books, but are not put on the foregoing account and list of liabilities, because the receivers do not agree as to them, Mr. John P. Baldwin being of the opinion that they should be recognized as liabilities and entitled to share in the dividend, and Mr. Henry Rennyson being of opinion that they should not:

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"Mrs. M. J. Leeds, \$21,430.12 and interest.....	\$21,430 72
"Mrs. G. W. Beattie.....	1,386 04
"J. B. Beattie.....	1,386 04
"Mrs. F. B. Leeds.....	4,268 70
"William Beattie.....	1,386 04
"Mrs. G. W. Noyes.....	180 00
"Total.....	\$41,704 60
"etc."	

To the foregoing account several oppositions were filed, not contesting the correctness of the account, but claiming that opponent's demands were improperly omitted from the list of creditors entitled to participate in the funds which were thereon marshaled for ratable distribution.

On the trial there was judgment sustaining certain of the oppositions, viz.:

1. That of Mary Josephine Rawle, wife of Charles J. Leeds, so as to recognize her as an ordinary creditor of Leeds & Co., Limited, in the sum of thirty-two thousand five hundred and twenty-eight dollars and eleven cents with interest thereon at eight per cent. from January, 1895; and as an ordinary creditor for such further sum as may be still due her on her claim of six thousand three hundred and sixty-nine dollars and thirty-five cents with like interest from the 18th of July, 1894, as recognized in the suit of the Canal Bank, subrogee, vs. Leeds & Co., Limited, after payment to her of her pro rata share of the proceeds of sale of the mortgaged property therein involved.

2. That the opposition of William Beattie be maintained in so far as to recognize him as an ordinary creditor in the sum of fourteen hundred and fifty-four dollars and sixty-nine cents with six per cent. interest from April 1, 1894, less certain reductions.

3. That the opposition of John B. Beattie be maintained in so far as to recognize him as an ordinary creditor in the sum of nineteen hundred and thirty-six dollars and eight cents with interest at six per cent. from April 1, 1894, less certain reductions.

4. That the opposition of Giles W. Beattie be maintained in so far as to recognize him as an ordinary creditor in the sum of nineteen hundred and thirty-six dollars and four cents with six per cent. interest from the 1st of April, 1894, less certain reductions.

5. That the opposition of Mrs. Sarah Avery, widow of Paul B. Leeds, be maintained in so far as to recognize her as an ordinary creditor in the sum of four thousand two hundred and eighty-five dollars and seventy cents with six per cent. interest thereon from April 1, 1894, less certain reductions.

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6. That the opposition of Helen Leeds be maintained in so far as to recognize her as an ordinary creditor in the sum of one hundred and eighty dollars with six per cent. interest thereon from the 1st of April, 1894.

7. That the opposition of Wood, Schneidau & Co. be maintained in so far as to direct that the receivers hold in reserve for *future* disposition whatever dividend may, agreeably to the present scheme of distribution, be attributable to an indebtedness of four thousand nine hundred and fifty-three dollars and twenty cents in the event it be ascertained that so much is actually due them.

8. That the opposition of Carroll & Carroll be maintained, so as to recognize them as privileged creditors in the sum of six hundred dollars.

Certain other oppositions, which require no special mention, were maintained, and others disallowed, and the account was homologated conformably to this decree; and from the decree Mrs. Charles J. Leeds, the liquidating commissioners, and one or two others, unnecessary to be mentioned, prosecute appeals.

In this court Wood, Schneidau & Co. have filed an answer to the receiver's appeal, and pray that the judgment appealed from be so amended as to conform to their opposition—that is to say, that they be placed upon the provisional account as ordinary creditors for the full sum of four thousand and fifty three dollars and twenty cents, and entitled to a pro rata distribution with other creditors thereon.

I.

The first question—and possibly the most important one—which meets us at the threshold of this case, is as to the correctness of the judgment of the court *a qua* in respect to the claim of Mrs. Mary Josephine Rawle, wife of Charles J. Leeds, for the sum of thirty-two thousand five hundred and twenty-eight dollars and eleven cents.

The foundation of this claim is the loan of a sum of money by Mrs. Charles J. Leeds—out of her paraphernal funds, under her administration and control—to the firm of Leeds & Co.; and that same remained in their possession and use throughout its many changes and transformations, during a period of over forty years; and that same is evidenced by proper entries made in the books of Leeds & Co., and of their different successors and assigns—showing the interest, charges and computations and credits for partial payments

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made on account, resulting in the balance claimed in her opposition.

It will be perceived at once, as the account admits, that the opponents' claim is regularly placed upon the books of the commercial firms of Leeds & Co. and upon those of the corporation of Leeds & Co., Limited; that there is no question of the *primary existence* of the debt, notwithstanding Charles J. Leeds was a member of the partnership and a shareholder of the corporation; but, admitting the existence of an indebtedness of the partnership first and of the corporation afterward, the contention of counsel for the liquidating commissioners is that interest should have been computed and charged at the rate of five per cent. per annum from the commencement to the end of the running account—resulting in a total debit balance of seven thousand four hundred and forty-nine dollars and one cent in favor of opponent.

On the other hand, the contention of opponent's counsel is that the accounts of the partnership and of the corporation with Mrs. Leeds were periodically cast up, and interest at eight per cent. was computed thereon and carried into the account as capital; and that upon the balance thus ascertained eight per cent. interest was again calculated, and this process being continued from year to year, credits being deducted, the balance claimed was produced.

It will be observed that this is not the ordinary case of a debtor resisting the demand of a creditor, upon the ground that he has been charged usurious interest; but that of liquidating commissioners of a defunct corporation, resisting these corporate acts, while it was a going concern, upon the theory that they were prejudicial to the mass of its creditors.

The case stands, and must be considered, as one in the nature of a revocatory action, as our judgment, if it supports the contention of commissioners, must declare the acts which are complained of illegal and void. *Allen, West & Bush vs. Nettles*, 39 An. 788.

It is further to be observed that the funds in court are marshaled for distribution pro rata amongst various *ordinary creditors* of the corporation, from participation in which the commissioners' account has excluded opponents altogether, upon the ground stated—opponents making claim as ordinary creditors of the corporation.

The view of the controversy first presented is one of law; and that being disposed of adversely to the contention of the commis-

doners, it then becomes a question of fact, in considering and determining which we must decide as to the competency and admissibility of the evidence.

From the record it appears that the account of Mrs. M. J. Leeds was opened with the commercial partnership of Leeds & Co. on the 15th of October, 1857, by the loan of four hundred and fifty-four dollars and fifty-five cents, and this was succeeded by another loan of one thousand two hundred and sixty-two dollars and sixty-three cents on the 5th of March, 1858; and against this she was debited with the sum of twenty-two dollars and fifty cents on the 30th of June, 1858.

During the years succeeding to the year 1873, there were various other loans of money made to Leeds & Co. by Mrs. M. J. Leeds, and various amounts were paid to her by the partnership; and the books of the firm show corresponding entries.

During the years intervening between that date (1873) and 1880, there seems to have been no transactions—everything having remained in *statu quo* in the meantime.

About February, 1881, there was a reorganization of the partnership, and a change of the membership thereof; but the new firm took up the account of Mrs. Leeds, and continued to receive from her loans of money, and to make partial payments to her on account, from the time of the reorganization until the year 1888.

Soon afterward the partnership was again reconstructed and passed into a limited corporation under a statute of the State; and this corporation, in its turn, took up the account of Mrs. Leeds and continued to receive loans of money from her, and to make partial payments to her, during the several succeeding years, and prior to the commencement of the liquidation of the corporation.

It was during the course of these transactions that the computations of interest were made and partial settlements were declared, of which the liquidators urge complaint; and the burthen of their complaint is, that *ordinary* creditors of the corporation, whose claims are of manifest *recent origin*, would be necessitated to receive a smaller distributive share, if such computation of interest and such settlements are approved of as legal and valid.

It is not suggested that either partnership was insolvent, or even in embarrassed circumstances at the time, or that the partnership was not perfectly competent, in every way, to deal with the account

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as they chose, and make such settlements with their creditors as they chose.

And it appears that the corporation, having been organized only three or four years prior to its liquidation, the scope of the inquiry could not legitimately extend any further back than its organization; and within that limit there was no item of credit for money advanced by Mrs. Leeds, and only three partial payments made on account, aggregating one thousand one hundred and ten dollars in amount.

The Code declares that if any one shall pay a higher rate of interest than five per cent. he may sue for and recover same back within twelve months from the time of such payment (R. O. C. 2924); and this declaration clearly signifies that the Legislature intended to bring such a right of action within the shortest possible limit, as a means of discouraging same as far as practicable, and of compelling a resort to this method of relief, while the transactions were of recent origin and the proof of them within easy reach. *Baker vs. Towles' Administratrix*, 11 La. 483; *Heirs of McGehee vs. McGehee*, 41 An. 659; *Wood vs. Egan*, 39 An. 685; *Outler vs. Succession of Collins*, 37 An. 95.

Leaving out of view, for the present, the *policy* of the law, and attending to the question of law under consideration, we find the Code declares that the rate of legal interest is fixed at five per cent. and that of conventional interest at eight per cent., and that the latter "*must be fixed in writing.*" *Id.* 2924. (Our italics.)

The phrase, "must be fixed in writing," is especially significant, in this connection, as the further declaration of the Code is that the whole amount of a demand is collectible, when supported by such "written evidence of debt for the payment of money," notwithstanding same "may include a greater rate of interest than eight per cent. per annum; provided such obligation shall not bear more than eight per cent. *per annum after maturity* until paid."

We do not consider it even doubtful that a debtor and creditor can deal with their accounts as they choose, and compute and carry into a settlement thereof any amount of interest they please within the letter or reasonable intendment of that article.

The only restraint it imposes upon the *contracting* power of parties is that they shall not stipulate for the payment of more than *eight per cent. after maturity*.

Undoubtedly the rate of interest was "*fixed in writing*" by Leeds

& Co., by computing it and charging the firm therewith. It did not exceed eight per cent. per annum at any time, either in the settlements they made or on the running account after settlement. *Bank of Louisiana vs. Stansbury*, 8 La. 262; *Thompson vs. Mylne*, 4 An. 206, *post*.

This was in the nature of an allowance of a higher rate than that of legal interest as a consideration of an extension of time for the payment of the principal, which is not considered usurious. *Foster vs. Wise*, 27 An. 538.

The question of the right of a creditor to compute and carry into an open and running account interest at the rate of eight per cent. was very carefully considered and decided by this court in *Allen, West & Bush vs. Nettles*, 39 An. 783, and our opinion therein is prefaced by the statement that, in the course of the business dealings of the parties, "accounts and statements had been frequently rendered (to the defendant) informing him fully of the nature of the charges made against him, and balances had been frequently struck and carried forward into new accounts. He received these accounts and never made any objection to them." And the opinion then proceeds:

"Defendant now seeks to overhaul these accounts from 1881, and claims and was allowed a deduction of four hundred and seven dollars and one cent for overcharges of interest, resulting from the charge of eight per cent. interest and from the compounding thereof by capitalizing, in the succeeding accounts, the balances from those preceding. We think this was an error. So far as these matters are concerned, the defendant can not go beyond the accounts which have been rendered to and accepted by him without objection. Parol evidence can not be received to prove a convention to pay eight per cent. interest; but when such charges have been made, and an account containing them has been rendered and accepted, the account becomes an account stated; the balance represents a settlement between the parties, to pay which a promise is implied, and such settlement can no more be impeached on the ground that such charges are included therein *than if the account had been paid and the action had been to recover them.*"

In that opinion quite a number of previous decisions of this court were cited as authority for propositions therein maintained; and their correctness has been frequently affirmed since. Applying that

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doctrine to the facts of the instant case it seems to have a stronger and fitter application, because the *debtor party prepared the books and made the entries upon which the settlements and interest calculations were predicated.*

It may, however, be both interesting and instructive to look into and collate some of the adjudications upon the subject for the benefit of jurisprudence.

Commencing with decisions which were rendered long anterior to the formation of the first partnership of Leeds & Co., we find the precepts announced in *Allen, West & Bush vs. Nettles* fully in accord therewith.

For instance, in *Millaudon vs. Sylvester*, 8 La. 262, the court said:

"The third objection was made on an allegation that compound interest was allowed on a balance of thirty-seven thousand dollars.

"This objection we are of opinion was correctly overruled.

"The plaintiff appears to have made up his account current with the partnership in which interest is charged and presented it to the firm, and this account with the items of interest, now deemed objectionable, were transcribed into the partnership books kept by *Sylvester & Son*, which were always under their direction and control and assigned by them."

So, in the instant case were the accounts of *Mrs. Leeds* spread upon the books of *Leeds & Co.*, and were always under their direction and control; and upon those books were the computations of interest carried into periodical settlements.

And the opinion further states, viz.:

"So, when partners, by the articles of partnership, fix the rate of interest to be charged by them at six per cent., and a partner renders an account for advances to the firm, and charges interest at ten per cent., which the partners having the direction of the firm receive, and enter upon the partnership books, *it is written evidence to their assent to that rate of interest.*"

In *White vs. Henderson*, 2 An. 241, it was held that "by Art. 1934 of the Civil Code, a contract to pay compound interest is lawful, if made after the interest has accrued."

In *Thompson vs. Mylne*, 4 An. 206, it was held:

"At the end of the year a balance of accounts and a balance of interest was struck, and carried together to a new account, thus calculating capital and interest upon the whole.

"This mode of stating the accounts was rejected by the creditors

as being in violation of Art. 1984 of the Civil Code; and the question now submitted is whether that article is applicable to merchants' accounts," and the court held it was not.

Again:

"By the general commercial law, when the custom of the place and the practice of the parties is to strike a balance of their accounts at fixed periods, and to render the account, the balance, composed of principal and interest to date, is viewed as the capital of the creditor, on which he is entitled to charge interest from that date. Acquiescence in an account so rendered, though not *per se* an agreement to it, is evidence from which it may be inferred that the party who received it without objection agreed to continue the same course of dealing, and to retain the balance on paying interest."

In *Sentell vs. Kennedy*, 29 An. 679, it was held:

"When a factor's account is closed, stated and rendered at the end of the commercial year, and not objected to by his client, showing a balance in his favor composed of principal and *accrued interest*, on such balance interest may be charged in any subsequent accounts between the parties.

"Interest on such balance is not compound interest."

Again:

"When a principal has dealt with a merchant through an agent acting under a power of attorney, the merchant may prove by parol the correctness of his account, and any acknowledgment of its correctness, or any ratification of it by the principal, even if the agent has transcended his mandate, or there are charges in the account which could not be legally made. * * *

"Ratification by the principal of the unauthorized acts of his agent makes those acts binding on the principal."

But, perhaps, the most opposite opinion of this court is that in the case of *Slidell vs. Pritchard*, 5 Rob. 101, from which we extract the following, viz.: "And we can see no good reason why an assignee should acquire any greater right. He must prosecute the defence of the suit as he found it; and it seems to us that the plea that the payment made was injurious to the defendant's *new* creditors can not avail the assignee, whose duty it is to exercise the rights and actions of the bankrupt in the situation in which he finds them at the time of the bankruptcy."

We are of opinion that the foregoing authorities effectually dispose of the question of law. and adversely to the contention of counsel for

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the liquidators, and that, as between debtor and creditor, or factor and customer, they must be accepted as conclusive.

The facts of this case may be taken historically, and may be more concisely related in narrative form; and same may be premised by the statement of the accounts as they appear in the brief of counsel for the liquidators, as furnishing an object lesson, without accepting their conclusions as correct. They are as follows, viz.:

MRS. M. J. LEEDS IN ACCOUNT WITH LEEDS & CO.

		No. 1.		Int. to Feb. 1, 1897, at 5 per cent.	
		<i>Credit.</i>			
1857—Oct.	15.	By cash.....	\$454 55		\$890 90
1858—March	5.	".....	1,262 68		2,404 08
July	13.	".....	10 00		19 27
Aug.	27.	".....	110 00		211 27
1859—Jan.	15.	".....	8 00		15 22
March	2.	".....	55 00		104 27
July	12.	".....	489 58		917 20
Aug.	10.	".....	110 00		206 70
1860—Jan.	11.	".....	8 00		14 10
Feb.	9.	".....	55 00		101 70
May	31.	".....	883 83		1,618 95
July	10.	".....	8 00		14 50
Aug.	10.	".....	110 00		210 00
1861—Jan.	16.	".....	8 00		14 41
Feb.	30.	".....	55 00		98 75
May	31.	".....	511 00		902 80
July	17.	".....	8 00		14 05
Aug.	12.	".....	110 00		194 90
Sept.	14.	".....	434 58		768 23
1862—March	15.	".....	63 00		118 85
1873—June	28.	From succession E. Grinnell.....	2,793 00		4,472 60
1874—		Nothing.....			
1875—		".....			
1876—		".....			
1877—		".....			
1878—		".....			
			\$3,546 67		\$18,303 56
		<i>Debit.</i>			
1857—		Nothing.....			
1858—June	30.	To cash.....	\$24 50		\$43 40
1859—Jan.	12.	".....	99 50		190 00
May	9.	".....	45 50		80 75
June	30.	".....	27 00		50 74
Aug.	18.	".....	55 00		102 60
1860—March	27.	".....	18 00		33 16
July	10.	".....	2,691 75		4,920 59
July	25.	".....	34 00		62 05
1861—		Nothing.....			
1862—		".....			
1863—		".....			
1861—Dec.	17.	To cash.....	25 00		40 20
1865—Oct.	9.	".....	200 00		312 84
1866—Jan.	16.	".....	100 00		155 30
1866—Jan.	25.	".....	250 00		387 80
1867—		Nothing.....			
1868—Aug.	17.	To cash.....	50 00		95 38
1869—		Nothing.....			
1870—Jan.	3.	To cash.....	60 00		80 80
1871—March	7.	".....	50 00		65 80
1872—		Nothing.....			
1873—Feb.	28.	To cash.....	50 00		59 75
1874—		Nothing.....			
1875—		".....			
1876—		".....			
1877—Nothing.....					
1878—		".....			
			\$3,783 28		\$6,671 65

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MRS. M. J. LEEDS IN ACCOUNT WITH LEEDS & CO.

No. 2.

Credit.

Int. to Feb. 1,
1897, at 5 per
cent.

1879—		Nothing.....			
1880—		".....			
1881—Feb.	21.	By cash.....	\$64 02	\$50 22	
April	12.	".....	108 21	88 91	
July	9.	".....	102 48	73 48	
Oct.	21.	".....	118 84	90 25	
1882—Jan.	11.	".....	128 68	90 66	
April	18.	".....	88 73	68 57	
May	18.	".....	409 89	301 16	
July	7.	".....	110 98	80 44	
Oct.	6.	".....	89 48	68 66	
1883—Jan.	6.	".....	118 52	82 90	
Jan.	15.	".....	59 26	41 50	
April	7.	".....	101 10	69 65	
April	11.	".....	50 54		
July	10.	".....	108 88	84 87	
Oct.	8.	".....	101 86	67 89	
1884—Jan.	5.	".....	138 50	90 42	
Jan.	14.	".....	56 25	45 50	
April	8.	".....	108 64	66 38	
July	7.	".....	151 67	98 83	
Oct.	6.	".....	91 19	56 30	
1885—Jan.	10.	".....	186 80	82 08	
May	25.	".....	204 66	119 46	
Sept.	24.	".....	76 14	42 40	
Oct.	20.	".....	183 03	74 81	
1886—Feb.	11.	".....	45 60	25 04	
March	26.	".....	84 28	45 66	
April	12.	".....	147 25	79 54	
July	20.	".....	62 89	83 00	
Oct.	29.	".....	99 85	58 02	
Dec.	20.	".....	78 40	89 80	
1887—April	9.	".....	161 50	79 5	
Nov.	18.	".....	178 87	88 27	
1888—May	12.	".....	161 50	70 68	
			\$8,968 88	\$2,879 60	

Debit.

Int. to Feb. 1,
1897, at 5 per
cent.

1879—		Nothing.....			
1880—		".....			
1881—Feb.	28.	To cash.....	\$3,084 00	\$2,418 20	
April	12.	".....	85 15	27 80	
1882—May	13.	".....	766 00	563 80	
1883—Jan.	6.	".....	118 52	83 36	
Jan.	15.	".....	59 26	41 60	
April	7.	".....	20 22	14 02	
April	11.	".....	181 42	90 85	
Nov.	6.	".....	200 00	182 40	
Nov.	27.	".....	117 52	77 02	
1884—		Nothing.....			
1885—Oct.	20.	To cash.....	67 00	87 58	
Oct.	22.	".....	20 00	11 80	
1886—Feb.	11.	".....	20 00	10 95	
April	13.	To cash.....	30 00	16 15	
June	17.	".....	90 60	48 13	
Oct.	29.	".....	100 00	51 29	
Dec.	30.	".....	78 40	36 78	
1887—May	5.	".....	25 00	12 10	
May	10.	".....	25 00	12 08	
June	16.	".....	10 00	4 75	
June	21.	".....	1 50	73	
Nov.	16.	".....	8 00	3 95	
Nov.	19.	".....	20 00	9 25	
Dec.	1.	".....	2 40	1 12	
1888—Jan.	17.	".....	20 00	9 07	
May	18.	".....	10 00	4 95	
Dec.	10.	".....	19 25	8 78	
			\$5,028 74	\$3,729 96	

In the Matter of Leeds & Co., Limited, in Liquidation.

MRS. C. J. LEEDS IN ACCOUNT WITH LEEDS & CO., LIMITED.

<i>Debits.</i>				Int. at 5 per cent. to Feb. 1, 1897.	
1880—		Nothing.....			
1890—		".....			
1891—Feb'y.	16.	To cash.....	\$1,000 00		\$297 90
1892—Sept.	14.	".....	10 00		2 20
1892—Nov.	4.	".....	100 00		21 00
1893—		Nothing.....			
1894—		".....			
1895—		".....			
			\$1,110 00		\$321 10
<i>Recapitulation.</i>					
Credits, firm No. 1.....				\$8,546 67	
Interest.....				14,804 86	
(redits, firm No. 2.....				8,968 88	
Interest.....				2,579 60	
Credits, corporation.....					
Total.....				\$28,096 71	
Debits, firm No. 1.....				3,786 25	
Interest.....				6,671 65	
Debits, firm No. 2.....				5,028 74	
Interest.....				3,729 96	
Debits, corporation.....				1,110 00	
Interest.....				821 10	
Total.....				\$20,559 70	
Deducting the totals.....				28,096 71	
					20,549 71
Leaves.....					\$7,449 01

The partnership of Leeds & Co. was first organized in 1850, and was composed of Edward Grinnell, Charles J. Leeds, Thomas L. Leeds and John Leeds; and it was subsequently reorganized in 1855 and again in 1858, with the same name and the same members; and there was a stipulation to the effect that in the event of its dissolution by the death of either partner, the same should continue between the survivors as the heirs of the deceased member.

But that in the event the parties in interest should be unwilling to continue, the surviving partners should have the right to purchase the property of the concern at a valuation to be ascertained by experts.

And, in pursuance of that stipulation, the partnership continued in existence until 1878, notwithstanding the death of several of the original members, when a liquidation and reorganization took place.

On July 31, 1878, there was a liquidation and settlement between Charles J. Leeds and John Leeds, surviving partners, and the heirs of Thomas Leeds and Edward Grinnell, whereby the entire assets of the concern were sold *in globo* to Charles J. Leeds, who assumed, as a consideration for the contract all the liabilities of the firm, and, at

the same time, Charles J. Leeds and Miss Julia Horn Leeds formed a partnership under the same name of Leeds & Co., in which the interest of Charles J. Leeds was fixed at nine-sixteenths and that of Miss Julia Horn Leeds was fixed at seven-sixteenths, and they agreed to become liable in that proportion for the debts of the old partnership.

And just here it is necessary to mention one of the contentions of counsel for the liquidators, pressed with great vigor and earnestness and very much relied upon by them; that is to say, that in this settlement and liquidation of the partnership the assumption by the new firm of the debts and the liabilities of the old firm was only good *pro tanto* as to all of said debts and liabilities, except that due to Mrs. Charles J. Leeds, for the reason that, as to that, Charles J. Leeds was incapacitated to acknowledge the debt and promise to pay the same.

But, in the first place, it is conspicuous that by this liquidation, settlement and reorganization, all of the *assets and property* of the partnership passed out of the old firm into the new, and remaining therein for a number of years, same was regularly transmitted to and incorporated into the corporation the liquidators represent; and it is by means of this extraordinary plea they propose to increase the distributive shares of one set of ordinary creditors out of the avails of these assets, to the *exclusion* of another—all of whose claims are otherwise well established.

This proposition was submitted to our learned brother of the lower court, and he most emphatically declined to accept it; and we have extracted from his exceptionally able opinion the following statement and make same a part of our opinion, viz.:

"It is said that when by the terms of the liquidation in July, 1878, Charles J. Leeds purchased the assets and assumed all the liabilities of the firm, which was then liquidated, and which was composed of Charles J. Leeds, John Leeds and the widows and heirs of Thomas J. Leeds and Edward Grinnell, he, said Charles J. Leeds, assumed only the debts of the said firm, and that he was 'under a legal incapacity to contract any such obligation toward his wife, and as far as his contract attempted to create any obligation on his part toward his wife, it was forbidden by law and void.

"I am unable to follow out the reasoning which leads to this singular conclusion. The wife was a creditor of the juridical person—

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age known as Leeds & Co., which was composed, as we have seen, of a number of persons. The assets of that firm constituted a common pledge for the security of all the creditors, including Mrs. Leeds, and by the terms of the contract by which the firm was liquidated, it was ascertained and agreed that these assets were more than sufficient to pay those debts. The amount that Charles J. Leeds was to pay for those assets was fixed and determined upon a comparison of the total of assets with the total of liabilities, and his assumption of the liabilities was part of the price which he was to pay for the assets. Can it be said that the husband can possess himself of property, pledged by a third person to his wife to secure a debt due her, under a contract by which he agrees to pay the debt, and yet incur no obligation to his wife? Was not the interest of Mrs. Leeds in the assets of Leeds & Co. paraphernal property, and did not that interest, with the assets themselves, pass into the possession and control of Mr. Leeds, and was it not used with said assets for the purposes of his business?

“It is said that Leeds & Co. No. 2 (composed of Charles J. Leeds and Miss Julia Horne Leeds), never, as a firm, assumed to pay the debts of Leeds & Co. No. 1 (composed of Charles J. and John Leeds, and Thomas J. Leeds and Edward Grinnell and the widows and heirs of the two latter).

“The evidence makes it apparent that the liquidation of Leeds & Co. No. 1, July 31, 1878, whereby Charles J. Leeds assumed all the liabilities of that firm, and the organization of Leeds & Co. No. 2, August 2, 1878, whereby Miss Julia Horne Leeds became a member of said firm, the interests of herself and partner were fixed at seven-sixteenths and nine-sixteenths respectively, and they bound themselves for the debts of the old firm in the same proportion—were substantially part and parcel of the same transaction. All the assets of Leeds & Co. No. 1, which Charles J. Leeds had acquired *in block*, subject to the condition that he should pay the debts of the concern, were by him immediately turned over, in block, to Leeds & Co. No. 2. And the new firm, knowing the conditions under which he held said assets, and the individual members specifically agreeing to fulfil those conditions to the extent of their respective interests in the firm, and as the consideration whereby the firm acquired said assets, neither the members nor the firm can deny their liability in the premises. Nor has there ever been any attempt

to deny such liability. On the contrary, as has been stated already, Leeds & Co. No. 2 carried upon its books, as its creditors, those who appeared upon those books when they were used by Leeds & Co. No. 1, as the creditors of that firm. Payments were made to them, deposits were received from them, interest was credited and capitalized; and the accounts as they stood upon the books of Leeds & Co. No. 1 were dealt with and treated in all respects as accounts to which Leeds & Co. No. 2 had succeeded and for which they were responsible. So that, aside from the direct testimony of Mr. Leeds upon the subject, the evidence of the liability of Leeds & Co. No. 2 in the premises is overwhelming. If anything further could be needed, it is to be found in the following stipulation in the contract between Charles J. Leeds and Miss Julia Horne Leeds, to-wit:

“ ‘Article I. The new copartnership shall commence on and be computed from the first day of the month of January, 1878.’ Thus making the new firm take the place of rather than succeed the old one.

“ ‘Proceeding further, we find that Miss Julia Horne Leeds died in 1881, and that, by judgment in this court of March 3, 1881, Mrs. Olivia B. Leeds was put in possession of her estate as universal legatee. And, upon this basis, it was argued that there was a new firm, and that the new firm has never assumed the obligation of the old, etc.

“ ‘The contract between Charles J. Leeds and Miss Julia Leeds contained the following stipulation, to-wit: §

“ ‘Article VII. In the event of the death of one of the copartners, the said partnership shall, nevertheless, continue (provided the same is agreeable to the survivor) between the heirs of the deceased and the surviving copartners, in the same manner and under the same conditions as if both were alive.’

“ ‘Mrs. Olivia B. Leeds, accordingly, as the sole instituted heir of Miss Julia Leeds, succeeded to her interest, and took her place in the existing firm of Leeds & Co., and the firm continued as thus constituted until 1889, when it was converted into a corporation, under the name of Leeds & Co., Limited, by act before Soniat, notary, June 18, 1889. The incorporators were Charles J. Leeds, Mrs. Olivia B. Leeds, widow of Thomas L. Leeds, Miss Grace Leeds, Thomas Leeds, Mrs. Louisa Leeds, wife of Norman Eustis, and Charles T. Leeds.

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"As part, substantially, as the same transaction, and by act before the same notary, June 22, 1889, the establishment and plant known as 'Leeds' Foundry,' together with all the assets of Leeds & Co., were sold by that firm, represented by Charles J. Leeds and Mrs. Olivia B. Leeds, as the heir and successor of Miss Julia Horne Leeds, to the new corporation of Leeds & Co., Limited. And as part of the consideration for said sale the corporation assumed, after mentioning specifically certain debts of Leeds & Co., which appeared upon the mortgage certificate, 'all other debts and liabilities of the old firm of Leeds & Co., composed of Charles J. Leeds and Miss Julia Horne Leeds, per act of Charles T. Soniat, notary, dated the 2d of August, 1878.'

"Having reached the conclusion that the firm of Leeds & Co. No. 2 was liable for the debts of Leeds & Co. No. 1, and therefore liable for the debt to Mrs. Charles J. Leeds, it follows that Leeds & Co., Limited, in assuming the debts and liabilities of Leeds & Co. No. 2, and in taking the entire assets, claims and credits of that concern, became liable for the debt due to Mrs. Charles J. Leeds, unless that debt was paid or prescribed at the time of said assumption. It is not claimed, however, that said debt was paid, and the evidence shows its acknowledgment, by payments on account, from time to time, up to 1889, and thereafter, by the corporation itself as late as November, 1892, so that the prescription has never been completed."

But counsel for the liquidators insist that "a husband can not be a witness for or against his wife, except when he acts as her agent; and that he is not a competent witness to prove the creation of the agency, nor to prove any acts done by her, nor any contracts made with her by other persons."

Again:

"A husband, who is at the same time agent of his wife, and president (and therefore agent and trustee) of a corporation, can not make a contract with himself, by a mental resolution, nor by making entries in the books of the corporation; and that he is an incompetent witness to prove her ratification of his acts," etc.

As abstract propositions, the foregoing may be true, perhaps; but in our conception inapplicable to the facts of this case.

There was no effort to show that the husband, Charles J. Leeds, occupying the dual position of mutual mandatory of the partnership

first and the corporation afterward, and of his wife, had attempted to make any contract with his wife, or for his wife; it is the implied obligation of the partnership and of the corporation, as well as their contractual liability, which grew out of the transactions of the partnership and of the corporation, which Mrs. Charles J. Leeds has invoked and seeks to enforce—albeit, her husband was, at the same time, a member of one and a stockholder in the other.

It is elementary that the mere acceptance and personal use or investment in his own name of the wife's funds creates an indebtedness in her favor and against the husband; and, that the husband, being legally competent to administer his wife's separate paraphernal property, is a competent mandatory to perform acts of administration for her. It is equally true that, in such case, no formal written mandate is essential, but that acts and transactions of the husband, in the management of his wife's business, will suffice, if known to the wife, and is acquiesced in or approved by the wife.

Now, in this instance, the wife's separate funds went into the partnership first, and the corporation afterward, and were used and appropriated in their business—the husband being a member of the partnership and a stockholder in the corporation. Consequently, several important consequences flow from their transactions, viz.: (1) The establishment of the debt of the husband to the wife, he being one of the members of the partnership first, and one of the stockholders of the corporation afterward; (2) That said indebtedness remains absolutely imprescriptible, in so far as the husband is concerned, so long as the marriage exists, notwithstanding the wife is judicially separated from him in property; (3) same being the indebtedness of a commercial partnership, every member of the partnership was liable for its payment *in solido* (R. O. C. 2872); and (4) the acknowledgment of one debtor *in solido* "interrupts the prescription with regard to all others, and their heirs." R. O. C. 3582.

The legal result of the situation is, that the acknowledgment of the debt by the commercial partnership of Leeds & Co. had the effect of binding all the members *in solido*; and the various acknowledgments thereof during the subsequent years, of interrupting the current of prescription in respect to the partnership and as to the individual members thereof. And O. J. Leeds, personally, became bound by and through the legal acts performed by the partnership, of which he was a member; because the partnership is a fictitious and

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ideal being, altogether independent of the individuals who compose it. This is evidenced by the books of the partnership and the accounts it rendered to its creditors, and which were tacitly acquiesced in through a long series of years, and whereupon were predicated a great many important business transactions. The partnership was competent to borrow money of Mrs. Leeds and to charge itself upon the books of the company, notwithstanding her husband was a member and *acted* as her agent at the time.

There existed no legal obstacle to his being the mutual mandatory of both lender and borrower.

This was the situation of affairs when the corporation was organized and took to itself the assets of the partnership and incurred the obligation of paying its debts, and upon which it subsequently paid one thousand one hundred and ten dollars.

Upon this subject the views of our learned brother of the district bench are so appropriate and conclusive that we extract same from his reasons for judgment and make them a part of our opinion, viz.:

"In all these transactions Mrs. Leeds had been represented by her husband, acting as her agent. It was he who, as her agent, received her paraphernal funds and placed them in her name and for her account in the business in which he was engaged. It was he who from year to year took cognizance of the making up of her account upon the books of the concern, and of the capitalization of the interest upon such occasions. Upon the other hand, it was Mr. Leeds who, in his capacity as a member of the different firms of Leeds & Co., and as an officer of Leeds & Co., Limited, made the entries upon those books, and it is said for this reason, that his acts as the agent of Mrs. Leeds are of no effect in her behalf.

"If this be true the only logical conclusion is, that if a man acting as the agent of another and having in his possession, for investment or otherwise, funds belonging to his principal, loans those funds in the name of his principal to a corporation of which he is an officer, and whose books he keeps, and the corporation uses the funds, it incurs no liability in the premises and can not be compelled to account for or return the money so used.

"I do not understand this to be the law. The dual position occupied by Mr. Leeds was no doubt one of great delicacy, but not more so probably than that of many brokers and others who are entrusted with money for investment. The transactions are of a char-

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acter which entitle them to be determined upon their merits. And, considered in that light, the fact is that the corporation obtained assets in which Mrs. Leeds was interested, and undertook, in consideration thereof, to pay the debt due her, upon the same terms as accorded to all other persons similarly situated, save, indeed, that Mrs. Leeds was not given a note, which she might have negotiated to the inconvenience of the corporation. She was granted no better terms than the other creditors of Leeds & Co. No. 2, whose debts were assumed by Leeds & Co., Limited, and I conceive of no good reason why her present position should be any worse than theirs."

But it is alleged by counsel of the liquidators that the corporation is insolvent, and that they, as the direct representatives of the mass of creditors, have both a right and an interest in setting up the defences which they have urged to the claim of Mrs. Leeds and other opponents, and those which neither Mr. Leeds nor the corporation could have urged against it. But this argument does not impress our minds at all favorably. The liquidators represent *all* the creditors equally, and to each they owe the same duty; and the creditors who are represented by liquidators exclusively derive their rights from and through the corporation and the prior partnerships—in the absence of any charge of fraud or collusion.

In *Hall vs. Mulhollan*, 7 La. 383, nothing more than that is said.

It is confidently claimed that the opinion of the District Judge and the contention of opponent's counsel are in antagonism to our decision in *Calder & Co. vs. Their Creditors*, 47 An. 1539. In the course of our opinion, we said:

"It is a familiar rule, that an opposition to an account of a syndic or administrator puts the burden on the party whose debt is opposed, to sustain it by proof, and neither the admissions or books of the insolvent *alone* will make proof *against* creditors." (Our italics.) Citing *White vs. Wilkinson*, 12 An. 360; *Lemos vs. Duralde*, 3 Martin's New Series, 258.

In that case the books of the commercial partnership were introduced in evidence for the purpose of establishing debts *due to the partnership*, while in this case they were offered and are partially relied upon to prove an *acknowledgment by the partnership to its creditors*. This is a different proposition altogether from the one presented in the *Calder* case. We do not appreciate the force of

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the argument, that acknowledgments of an indebtedness of a commercial firm can not be established by entries made in its books, particularly when same have been acquiesced in for many years as furnishing proof *against* it.

There is nothing in the views we have expressed which are at variance with those announced in *Vance vs. Bank*, *Ante* pp. 180, 878. The receivers represent the corporation of Leeds Company Limited, which had acquired by purchase the assets of a previously existing partnership, in which all accounts had been liquidated, and various settlements made acquiesced in, in the regular course of the dealings between them and their creditors, Mrs. C. J. Leeds among the number; and the obligations of which it had assumed in its organization act.

There is in this case no question of settlements between creditor and debtor *inter se*.

After a careful consideration of the law and evidence applicable to the claim of Mrs. Charles J. Leeds, we have reached the conclusion that it is correct; and we therefore concur in the opinion and decree of the judge *a quo*.

II.

With reference to the claims of G. W. Beattie, J. B. Beattie, Mrs. P. B. Leeds, William Beattie, and Mrs. G. W. Noyes, which are listed in the commencement of this opinion, it may be observed that they all arise out of the same transaction, and may be cumulated and discussed together, all of them being represented by notes which were executed in their favor respectively by Leeds Company, Limited, and all bearing date April 1, 1894, in the liquidation and settlement of a prior indebtedness of Leeds & Co. The District Judge in his reasons for judgment made a careful summary of the testimony, which is found in the record, and stated his views thereon, and it compares favorably with the impression the evidence has given us, we therefore adopt it as a part of our opinion, viz.:

"John B. Beattie claims as the holder of nine notes of two hundred and fifteen dollars and twelve cents, made by Leeds & Co., Limited, April 1, 1894, and payable in from two to ten years, with interest from date at the rate of six per cent. per annum.

"Giles W. Beattie makes a like claim.

"William Beattie claims upon six notes of two hundred and fifteen

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dollars and twelve cents each, made by Leeds & Co., Limited, April 1, 1894, and payable in from five to ten years, with interest from date at the rate of six per cent.

"B. R. Forman holds three notes, originally issued to William Beattie, dated April 1, 1894, and payable in two, three and four years; two for two hundred and fifteen dollars and twelve cents, and one for fifty-one dollars and fifteen cents. He alleges that he has advised the receivers not to acknowledge them as debts of Leeds & Co., Limited, but that if the court should conclude that the series to which said notes belong, a majority of which are held by William Beattie, should be recognized, then and in that case said notes should also be recognized.

"Mrs. Sarah Avery, widow of Paul B. Leeds, claims four thousand two hundred and eighty-five dollars and seventy cents as a holder and owner of nine notes made by Leeds & Co., Limited, to her order, dated April 1, 1894, and payable in from two to ten years, with interest at six per cent.

"Helen Leeds claims one hundred and eighty dollars as holder and owner of a note made by Leeds & Co., Limited, dated April 1, 1894, to the order of Mrs. G. W. Noyes, and by her endorsed, payable on demand, with interest at six per cent.

"These claims, as I understand the testimony, have the following origin:

"Jedediah Leeds, the father of Charles J., Thomas L. and John Leeds, established and owned the foundry. He married as his second wife Abbie E. Babcock, by whom he had two children, Paul and Grace, and thereafter died, leaving by will to his wife the sum of ten thousand dollars, and also the usufruct of other money, which, at her death, was to go to Paul and Grace.

"In some early settlement in the succession of Jedediah Leeds, as far back as 1852, the ten thousand dollars mentioned fell into the hands of John Leeds, who gave the widow his note for it secured by mortgage on his interest in the foundry. The interest on this note was paid by the firm of Leeds & Co., of which John Leeds was a member, and the note and mortgage were kept alive until 1877, when there was a balance of eight thousand seven hundred dollars still due, for which judgment was obtained with recognition of the mortgage and an order for its enforcement. As part of this suit, Leeds & Co. were garnisheed, and answered that John Leeds, the

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defendant, really had nothing in their hands, having largely overdrawn his account. Nevertheless the mortgage on the property was recognized, as stated above, and as John Leeds' overdrafts on the books were not placed of record as affecting his title to the real estate and would not have affected the mortgage in question in any event, it would seem that the judgment was good. Leeds & Co., however, as it appears, did not desire to have the interest of John Leeds seized and sold under execution, as it would have forced a dissolution and liquidation in a manner which would probably have prejudiced the interests of all concerned. Upon the plaintiff, who had by that time become Mrs. Beattie, consenting to forbear, the firm assumed the debt, and appear to have thereafter carried it on their books as a firm debt. In the liquidation and transfer, July 31, 1878, the mortgage in question, together with all others inscribed, was assumed by Charles J. Leeds, and upon his forming partnership with Miss Julia Horne Leeds, the property was transferred to her to the extent of seven-sixteenths, as it stood. Later on, June 22, 1889, when Charles J. Leeds and Mrs. Olivia B. Leeds (heir of Miss Julia Horne Leeds) transferred the property to Leeds & Co., Limited, the act, to which Mrs. Beattie was not a party, recites that the mortgage was prescribed and was to be canceled; but it was not to be claimed in the course of the transaction by which the firm of Leeds & Co. became merged into Leeds & Co., Limited, and the property of the former transferred in block to the latter concern; that the claim of Mrs. Beattie was prescribed. On the contrary, I infer that it stood as a recognized subsisting claim, upon which interest had been paid regularly, upon the books of Leeds & Co., and as such it was assumed by Leeds & Co., Limited, as part of the price to be paid for the assets thus acquired by that corporation. And it continued to be recognized by Leeds & Co., Limited, until April 1, 1894, when the notes sued on were given, in still further recognition. In explanation of the notes it need only be said that after the death of Jedediah Leeds the widow married Dr. James Beattie, and that she thereafter died, and that the notes are held by her heirs or their transferees.

"The claim of Mrs. Paul Leeds differs somewhat in the details of its history from the others. But the fact remains, with regard to her claim, as with regard to the others, that the debt was assumed by Leeds & Co. for a valuable and sufficient consideration, was uniformly

recognized by that firm and entered into the transaction by which Leeds & Co., merged into and transferred its property to Leeds & Co., Limited. After a while, and as late as 1894, Leeds & Co., Limited, in further recognition of said claim issued the notes sued on. The good faith of the parties claimant is indicated in the fact that they still hold the notes which were issued in April, 1894, whilst Leeds & Co. Limited, was a going concern, and appear to have made no effort to transfer them to third persons.

“I am of opinion that the opponents are entitled to recover, calculating both interest and discount upon the notes to their respective maturities.” * * *

The foregoing presents a very clear elucidation of the Jedediah Leeds transaction and history of the legacy of ten thousand dollars he made to Abbie Babcock, his wife—same being the amount for which John Leeds gave his note and mortgage on his interest in the foundry. This note and mortgage being subsequently merged in a judgment for which Leeds & Co. became bound, the settlements which are represented by the notes in controversy were made in the interest of the corporation and to prevent a forced liquidation thereof.

Under this state of facts the corporation and its liquidators are unquestionably bound to opponents.

III.

With reference to the claim of the opponent, Mrs. Charles J. Leeds, to be recognized as an ordinary creditor for such further and additional sum as may be due her, over and above her distributive share of the proceeds of the mortgaged property which was lately in controversy in the suit of New Orleans Canal and Banking Company vs. Leeds & Co., No. 12,211, we think her right is clear.

In that suit the court fixed the amount of Mrs. Leeds' claim at the sum of six thousand three hundred and sixty-nine dollars and thirty-five cents, with interest thereon at eight per cent. per annum from July 10, 1894, affirming a judgment of the District Court.

In casting up the account, the judge *a quo* made the following calculation, viz.:

* * * * *

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" It appears from the sheriff's return that the different lots of ground and buildings covered by the mortgages and designated as Nos. 1, 2, 3, 4, 5, were sold under the fourth mortgage, for.....	\$81,859 49
" Deducting therefrom the amount of the first mortgage, with interest to June 24, 1896.....	10,017 00
" And there is a balance of.....	\$21,842 49
" The second and third mortgages do not, however, cover the property—No. 6; hence, deducting the pro rata proceeds of that property.....	2,090 62
" And we have to pay second and third mortgages.....	\$19,751 86
" The second and third mortgages, with interest to July 18, 1896, and costs, amount to.....	\$27,502 80
" Crediting same with proceeds as above.....	19,751 86
" Balance due on second and third mortgages.....	\$8,250 94
" Net proceeds of sale of property immovable by destination.....	12,007 74
" Deduct balance due on second and third mortgages.....	8,250 94
" Balance for distribution.....	\$3,756 80
" Net proceeds of property No. 5.....	1,818 79
" Total balance for distribution.....	\$5,575 59

" Which balance being distributed pro rata in part satisfaction of the claims of the Canal Bank and of Mrs. Chas. J. Leeds, as fourth mortgage creditors, the bank for five thousand dollars and interest and Mrs. Leeds for six thousand three hundred and sixty-nine dollars and thirty-five cents and interest, amounts remaining unpaid constitute ordinary debts and should be so recognized."

* * * * *

The judgment appealed from recognized the right of Mrs. Charles J. Leeds as ordinary creditor to be placed upon the provisional account for whatever sum may be found due after her pro rata share of the proceeds of the sale of the mortgaged property has been credited thereon; and it decreed her entitled to participate in the distribution of the proceeds, which the receivers have marshaled for distribution thereon, pro rata with other ordinary creditors.

In our opinion his judgment is correct.

IV.

The proof shows that Messrs. Carroll & Carroll, as attorneys at law, rendered services to the corporation, and participated in the court proceedings in which the liquidators were appointed, and represented them primarily.

It also appears that those proceedings were, in a great measure, inaugurated upon their advice.

The amount of six hundred dollars demanded appears to us to be quite reasonable, and there is no substantial ground assigned for the disallowance of same,

V.

Messrs. Wood, Schneidau & Co. claim, as ordinary creditors, the sum of four thousand nine hundred and fifty-three dollars and twenty cents, and demand a distributive share of the fund proposed for distribution; but the judge *a quo* decreed that the receivers *hold in reserve for future distribution* whatever dividend may be attributable to such an indebtedness, in the event it be ascertained that so much is actually due or any portion thereof. Their answer to the appeal insists upon an absolute and present judgment decreeing them a distributive share.

Counsel for the receivers suggest that it is impracticable for the court to determine the question of amount until certain direct actions against them have been disposed of; and that the determination of same ought to be left open until the final account is filed.

We are of opinion that this is the proper course, especially in view of the reservation which the judge made in his decree.

The foregoing propositions are those which have been discussed in briefs and were argued at bar, and are the only ones about which there appears to have been any serious controversy.

Our investigation of the record has led us to the same conclusion at which the judge *a quo* arrived, and we therefore concur in his decree.

Judgment affirmed.

BREAUX, J., and MILLER, J., concur in the decree.

No. 12,151.

LOUISIANA CONSTRUCTION AND IMPROVEMENT COMPANY ET ALS. VS.
THE ILLINOIS CENTRAL RAILROAD COMPANY ET ALS.

40	537
51	824
49	527
109	411

The Common Council of the city of New Orleans, possessing under its charter and other statutes of the State only power of administration, has no authority to enact and promulgate an ordinance authorizing a railroad corporation to erect buildings and other permanent structures upon the batture in front of its riparian property on the bank of the Mississippi river, within the limits of the city, connect same with wharves on the edge of the water and consecrate same to its exclusive use and enjoyment for a period of ninety-nine years.

Such an ordinance confers a grant that is in the nature of a perpetuity, and not a license revocable at the will of the municipality.

Miller, J., concurring: Our courts have recognized the right of action of the citizens in controversies of this nature. Whenever batture is withdrawn, enough must be left for public use. This ordinance takes all, and practically for all time.

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Whether accretion in the future expands this batture, or the encroachment of the river diminishes the area, the ninety-nine years' ordinance is to stand an impediment, I think, to that control of public places, apt to become requisite, conferred on the Council for the public good, and with which I think the city can not part.

Breaux, J., dissenting: Under its delegated and implied powers the city has the right to pass an ordinance "to extend the commerce of the port, and to facilitate the export and import business" of corporations in the service of the public. The license being legal and authorized is not made necessarily void as between plaintiffs and defendants by the period of ninety-nine years for which it was granted.

The defendant common carriers are legally authorized to maintain a free wharf for vessels connected with their business, upon condition that improvements were to be made in the interest of commerce and industry. The use is public, and there was no invasion of the legal or equitable right of any one.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

J. R. Beckwith for Plaintiffs, Appellants.

S. L. Gilmore, City Attorney, for City of New Orleans, Appellee.

Thomas J. Semmes and *Farrar, Leake & Lemle* for Defendants, Appellees:

ON APPLICATION FOR A REHEARING.

Plaintiffs, a citizens and taxpayers, are utterly without interest in the subject matter of this suit; there being no showing in the petition that the ordinance complained of increases, directly or indirectly, the burden of taxation. Code of Practice, Art. 15; *Handy vs. New Orleans*, 39 An. 107; *Conery vs. Waterworks*, 41 An. 921; *Dillon on Municipal Corporations*, Secs. 920, 922, and authorities there cited; *Beach on Public Corporations*, Sec. 631, and authorities there cited.

By the Civil Code the "use of the banks of navigable streams is public, etc. Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands." C. C., Art. 455. The highest authorities in the greatest cases that ever arose on this question have settled this for all time. *Municipality No. 2 vs. Orleans Cotton Press*, 18 La. 122; *New Orleans vs. United States*, 10 Pet. 662.

The general public servitude in this article described does not, however, exist for all purposes, but only for such as are incident to the nature and navigable character of the stream. Lyons vs. Hinckley, 12 An. 657; Railroad Co. vs. Winthrop, 5 An. 36; Duvergé vs. Salter, 6 An. 450.

A reading of Partidas, Title XXVII, laws 6, 7 and 8, will show that the above *dictum* as to the nature and character of the general public servitude in the banks of rivers is literally correct, even under the old Spanish laws. Moreau & Carleton's Partidas, Vol. 1. pp. 337, 338.

The legal presumption from the character of the structures authorized by the ordinance at bar, "wharves, docks, piers, elevators, warehouses," etc., must be that such structures will be facilities to commerce and navigation. Stevens vs. Walker, 15 An. 578; Atlee vs. Packet Co., 21 Wall. 393; Geiger vs. Filor, 8 Fla. 323.

As "individuals of full age, residing in the place," plaintiffs are equally without rights of action, under Art. 861 of the Civil Code of 1870, to prevent the construction, by riparian proprietors, of buildings and other works of public utility, for the mooring of vessels and discharge of their cargoes," as authorized by the ordinance complained of, since the city of New Orleans has express delegated power to authorize such structures. Civil Code, Art. 863.

This power she has exercised in the fullest terms, over and over again for years.

The Code of Louisiana, of 1808, does not contain Art. 863 or any part of Title VI. This is an innovation. See Amendments to the Civil Code.

The entire legislation of the State and the jurisprudence from the earliest times recognize the authority of the city of New Orleans to control and administer in the interest of commerce the public servitude along the banks of the Mississippi river within her limits, and there is no case in Louisiana jurisprudence denying the right of any municipal corporation to license the building of wharves and other works of public utility by riparian proprietors, when contested by one or more individual inhabitants.

In instances where the city of New Orleans appears to have delayed or refused to grant interstate railway companies the right to connect carrying facilities by land with shipping, the sovereign

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power in furtherance of its general policy of encouraging railroad enterprises has stepped in and acted directly. 27 An. 414; Act 78 of 1870.

The Dock Commission Act contains an express legislative recognition of the right of riparian proprietors to maintain, for their exclusive use, wharves established prior to the passage of the act, under whatever authority constructed. Act No. 70 of 1896, Sec. 2, page 108.

The ordinance complained of is not an alienation nor a sale or lease of city property, which the city is restricted, in the mode of dealing with, by the terms of her charter, limiting a lease to ten years and requiring public competition. City Charter of 1882, Sec. 8; Act 135 of 1888; Construction Co. vs. City, 140 U. S.

The term ninety-nine years can have no determining effect on the validity of the ordinance. If no terms had been expressed in the ordinance it would have been perpetual or during the "term of the charter" of the licensee. Telephone Company vs. City, 40 An. 41; East Louisiana Railroad Company vs. City, 46 An.; Flynn's Digest of City Ordinances, p. 1208; Wharf Ordinance of Texas & Pacific Railway Company.

Whatever be the limit of time or term, if any, for which the city could authorize such structures, as provided in this ordinance, whether for ten or twenty-five years or more, no right of action could arise in respect to the ordinance upon that ground, until the legal period had expired.

Articles 46 and 56 of the Constitution manifestly have no application to this case.

Argued and submitted December 19, 1896.

Opinion handed down February 15, 1897.

Rehearing refused (reasons assigned) April 12, 1897.

The opinion of the court was delivered by

WATKINS, J. The plaintiffs allege that the Louisiana Construction and Improvement Company is the present lessee of a very large portion of the wharves on the banks of the Mississippi river in front of the city of New Orleans, for a term of years, with several years thereof yet to run.

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That said lease was farmed out to said corporation at public auction; and that it acquired same for a large and valuable consideration, paid and to be paid to the city, over other bidders therefor.

That said corporation as lessee, as well as other taxpaying inhabitants of the city whom they personate, have an interest in asserting in a court of justice the patent illegality of a city ordinance, the enactment of which was an attempted exercise of a power which had not been granted to the municipality by the Legislature, and was *ultra vires* and void.

The petitioners then represent that the council of the city of New Orleans purported and attempted to enact Ordinance No. 11,765, Council Series, on the 15th of January, 1896, the purport and effect of which was to confer upon the defendants authority to erect upon the batture in front of their riparian property such permanent structures as warehouses, sheds, elevators, buildings, railroad tracks, switches, turnouts, sidings, etc., same to be of such character and capacity "*as the necessities of (their) business may require;*" and further authority to use and operate and maintain the same.

And the further effect and purport of said ordinance appears to be that, at the same time, the defendants may permit all vessels or other water crafts landing, with their permission, at the wharves which they may construct on the water's edge, or doing business with them, to receive and discharge all of their cargoes free of any wharf dues or charges of any kind whatever during the continuance of the term of their grant—said grant being of the duration of ninety-nine years, and having been conferred without public advertisement and adjudication, and without the payment of *any* price, present or prospective.

Upon this hypothesis the plaintiffs claim that the said ordinance is, in legal effect, a *grant in perpetuity of all the rights and uses of the batture and wharves* of a large segment of the Mississippi river, in front of the city, gratuitously, and that the effect of same upon the riparian property of the corporation would be to consecrate it in fee simple to the uses and purposes of the corporation irrevocably. In other words, that the City Council of New Orleans, possessing only the power of *administration* of the wharves and batture, has undertaken, by said ordinance, to confer upon the defendants the perpetual and exclusive use and enjoyment of a portion of them gratuitously; and that the ordinance is *ultra vires*, and, therefore, void.

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And, further, that the city is incapacitated to convey in this manner, or to surrender its police power to either corporation or individual, public or private.

The full text of the ordinance is as follows, viz. :

MAYORALTY OF NEW ORLEANS, }
CITY HALL, January 15, 1896. }

(No. 11,765, Council Series.)

"1. *Be it ordained by the Common Council of the City of New Orleans*, That in order to extend the commerce of the port and to facilitate the export and import business of the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, permission and authority be and are hereby granted to the said companies, their successors and assigns, to *occupy for their uses and purposes* for the period of ninety-nine years from the date hereof, all that *part of the batture* lying between Toledano and General Taylor streets fronting the property owned by either of said companies in the Sixth Municipal District of the city of New Orleans.

"2. *Be it further ordained, etc.*, That the said Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, their successors and assigns, be and they are hereby authorized to construct, maintain and operate thereon such wharves, docks, piers, bulkheads, elevators, *warehouses, sheds, buildings and appurtenances as the necessities of their business may require*; all such wharves to be lighted, maintained and kept in repair by the said companies at their own expense.

"3. *Be it further ordained, etc.*, That the said railroad companies in the construction of such wharves shall be required to conform, as nearly as may be, to the standard of the specifications of the existing wharves for steamships between Thalia and Callopie streets.

"4. *Be it further ordained, etc.*, That all steamships, vessels and other water craft receiving or discharging cargo at said *wharves for either of the said railroad companies*, or any steamships, vessels or other water craft *using said wharves by and with the consent of said railroad companies*, shall be exempt from payment of all wharf dues; but this shall not exempt steamships, vessels or other water craft from wharf dues for receiving or discharging cargo at or occupying any other wharf.

"5. *Be it further ordained, etc.*, That said railroad companies shall have the right to construct, maintain and operate, with steam locomotives, or other appropriate motive power, upon and along said wharves, and upon the property owned by said companies, between Tchoupitoulas street and the Mississippi river, from Toledano street to General Taylor street, with the right to cross all intervening streets, all such tracks, switches and turnouts as may be necessary to carry on the business of said companies, with the right to connect said tracks, switches and turnouts with existing tracks of the New Orleans Pacific Railroad Company on Water street, and with the wharves, docks, elevators and buildings that said companies may construct upon said batture and property owned as aforesaid; and said companies shall have the further right to construct, maintain and operate a single track from Toledano and Water street along Water street to General Taylor street, with such switches, sidings and turnouts as may be necessary to connect said single tracks with said existing track and with the wharves, elevators and buildings aforesaid; all such tracks, switches, sidings and turnouts to be constructed on lines and levels to be approved by the City Engineer.

"6. *Be it further ordained, etc.*, That all the acts and doings of the said companies, under this ordinance, shall be subject to any ordinance or ordinances which may be hereafter passed by the City Council concerning the same.

"7. *Be it further ordained, etc.*, That this ordinance shall take effect from and after its passage.

"8. *Be it further ordained, etc.*, That work shall be commenced within ninety days from the promulgation of this ordinance.

"Adopted by the Council of the city of New Orleans, January 14, 1896.

"DAN A. ROSE, *Clerk of Council.*

"Approved, January 14, 1896.

"JOHN FITZPATRICK, *Mayor.*

"A true copy.

"CLARK STEEN, *Secretary to the Mayor.*"

And the following are the objections which are stated in the plaintiffs' petition, and the grounds of nullity upon which they claim to rely, viz.:

I.

"There is and was vested in the said city government no lawful authority to grant away from or dispose of any property, right or thing of value to the inhabitants of the city of New Orleans or the people of the State 'to any person, persons, association or corporation, public or private,' this being expressly prohibited by Art. 56 of the Constitution of the State and is *ultra vires*.

II.

"The supposed ordinance on its face unlawfully grants to the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company special and exclusive rights, privileges, immunity and monopoly in the said described public batture, between General Taylor and Toledano streets, to the exclusion of the public, in violation of the State Constitution, particularly Art. 45, and the provisions of said Constitution prohibiting monopolies.

III.

"The batture between General Taylor and Toledano streets, between the public levee and the river, is public property as *locus publicus*, under the laws of the State and Civil Code thereof, to the use 'of which all of the inhabitants of the city, and even strangers, are entitled in common,' and the City Council is without authority or power to destroy or change such public servitude, or repeal and cancel such public grant and consignment to general public use made by the State, and deliver over to private corporations the dominion and control thereof for their own private ends and purposes, as attempted in said supposed ordinance.

IV.

"Under the public law and jurisprudence of the State no person or corporation can acquire any right to construct or maintain any permanent building or structure on said batture, or make any use thereof tending to impair or impede the right of the public to free access to said banks and batture as a *locus publicus*, or the free public use thereof for all of the purposes for which such public right and servitude on river banks and battures was established by law. Yet, said supposed ordinance, on its face, not only destroys said public right and servitude for the period of ninety-nine years by excluding

the public therefrom without the permission of the supposed grantees, but allows its destruction as a *locus publicus* by the erection of such permanent private 'wharves, docks, piers, bulkheads, elevators, warehouses, sheds and appurtenances' as the supposed grantees may elect at their unrestricted pleasure, which, when erected, are to be private property, under their private control, with even no reservation of the right of entry by the public, either to the said structures when erected, as to the territory, in terms granted away by the said supposed ordinance.

V.

"It is beyond the legislative or granting authority of the government of the city of New Orleans to grant or convey away the right of the public in any *locus publicus* to any persons or corporations, either permanently or for any time or term of years.

VI.

"The Legislature of the State never intended to or did ever confer on the government of the city of New Orleans power or authority to make or adopt said ordinance, either in the charter of the city or any amendment thereof, or under any implication of power necessary or legitimate to carry out any power actually conferred on said city for its government. Sec. 8 of the City Charter, approved June 23, 1882, as modified by Act No. 135 of the acts of 1888, only conferring on the city power to either construct wharves and improve the banks, landings, and increase the utility thereof for public commerce itself, or lease the same for a limited period 'to such persons as will bind themselves, with security, to construct and keep in good repair such wharves and landings, and construct and keep in repair sheds over the wharves, and light the same and pay the cost of policing the same, for such just and reasonable charges on vessels and merchandise, or either, for the use of the wharves or sheds, as may be fixed in advance by the Council, and with such specifications as may be required by them.' The limit of leased terms being ten years, and for strictly public use.

VII.

"If the city had power to destroy and cut off the right of the public in said *locus publicus* by any form of legislation, the supposed

ordinance is void, because it purports, and on its face grants a term of occupancy of said batture and landings for a period of more than ten years, and without the free competition and adjudication by the Comptroller, after the advertisement and competition made imperative by Act 135 of the acts of 1888, and excludes public general commerce from the use of said *locus publicus*, either for entry, passage or mooring, or unloading of the vessels, without the consent of the supposed grantees named in the supposed ordinance is first obtained, to the exclusion of all authority of the city, the harbor master or any authorities of the port, thereby attempting in said supposed ordinance to convert public rights, public ways and public servitudes into strictly private property and title for ninety-nine years, excluding the general public not only from said territory and public place, but from the benefit and use of all the permanent structures, railways and wharves that the grantees may construct or project into the river at their will.

VIII.

“That under the laws and settled jurisprudence of this State said supposed ordinance is null and void, because it is unreasonable and oppressive, and contrary to right and public policy.”

To this petition the defendants tendered, amongst other things, an exception of no cause of action; and this exception having been sustained, and their suit dismissed, the plaintiffs have appealed.

The province of this court is to determine whether or not the averments of the petition, coupled with the terms and conditions of the ordinance, which for the purposes of the exception are to be considered as read into the petition, have stated a cause of action. As the record discloses that the judge *a quo* did not deal with the question of the right or interest of the plaintiffs to institute this suit, we shall assume that to be true, and restrict our views to the want of corporate power in the City Council to pass the ordinance.

The provisions of the statute of the State which granted a charter to the city of New Orleans, upon this subject, are as follows, viz.:

“Sec. 8. * * * (5) To prescribe and collect wharfage and levee dues and to erect sheds over the wharves and buildings, to protect merchandise and make such charges therefor as will pay for the construction, keeping in repair, lighting and policing of such sheds and no more.

"The Council may lease or farm out the wharves and landings in sections for a period *not exceeding ten years*, to such persons as will bind themselves with security to construct and keep in good repairs such wharves and landings, and construct and keep in repair sheds over the wharves, and light the same, and pay for the cost of policing the same, for such just and reasonable charges on vessels and merchandise, or either, for the use of the wharves and sheds, as may be *fixed in advance* by the Council, and with such specifications as may be required by them." Act 20 of 1882.

But that act was amended in 1888 as follows, viz:

"Act 135, Acts 1888: Sec. 3. *Be it further enacted, etc.*, That said Council shall have no power to make or renew any lease of the wharves and landings, or any lease or sale of city property, except after public advertisement and free competition, and adjudication by the Comptroller to the lowest or highest bidder, as the case may be, according as the specifications of said lease or sale may require."

This is all the authority the city possesses in the premises—"to erect sheds over the wharves and buildings to protect merchandise," and to "farm out the wharves and landings * * * to such persons as will bind themselves * * * to construct and keep in good repairs such wharves and landings; and construct and keep in repair sheds over the wharves"—not to exceed a term of ten years.

The City Attorney in his brief takes the position that the railroad company has the right "to construct wharves, or other artificial accommodations for commerce in front of its property, and can use the same until the city of New Orleans exercises her exclusive right of building wharves," etc. Brief, p. 1.

Citing: *Ellerman vs. Morgan Railroad Co.*, 34 An. 698; *Ellerman vs. McMains*, 30 An. 190; *City of New Orleans vs. Wilmot*, 31 An. 65; *City of New Orleans vs. Railroad Co.*, 27 An. 414; *Ellerman vs. Railroad*, 105 U. S. 166.

Further, that the city has the power to designate a particular portion of the landings for the use of a particular public carrier, and to allow the use of batture for the erection of sheds and other structures necessary for the shipment or temporary storage of merchandise.

Citing: *Heirs of Leonard vs. Baton Rouge*, 39 An. 284; *City of New Orleans vs. Railroad*, 27 An. 415; *Stevens vs. Walker*, 15 An. 577.

From the foregoing he makes the following deductions, viz.:

"The ordinance in question, in so far as it purports to grant to the Illinois Central Railroad Company the right to occupy for its uses and purposes, for the period of ninety-nine years, from January 15, 1896, all that part of the batture between Toledano and General Taylor streets, fronting the property of said railroad, is not valid, as a contract, the city being without power to grant to any person, for any purpose, the right to use any particular portion of the river front for a term of years; but the ordinance is valid as a license, which the city has a legal right at any time to revoke, and which must stand until revoked by the city."

No doubt could be entertained of the legality of the ordinance, if it extended no further nor granted anything more than the argument of the City Attorney assumes; but he fails altogether to treat the real gist of the ordinance, which, in our opinion, is, the gratuitous permission by the city to the defendants to erect upon the batture in front of their riparian property *permanent structures*, such as warehouses, elevators and the like, and to maintain the same for their exclusive uses for a period of ninety-nine years, in connection with and in addition to the aforesaid wharves. His argument altogether ignores the provision of the act of 1888, which declares in positive and mandatory terms, "that the (City) Council shall have no power to make or renew any lease of the wharves and landings, or any lease or sale of city property except after public advertisement and free competition," etc.

The license spoken of is nothing more nor less than the lease or farming out of the wharves and landings, which is mentioned in the city charter above quoted, for there is no other license known to the charter of the city. This is recognized to be the case in the dissenting opinion, from which we quote the following, viz.:

"The power the city now has of passing an ordinance authorizing the lease of the wharves for ten years covers a similar power we think as to the term of the lease. The city having the right to let for a term of ten years, has the power to issue a license at least for that length of time."

Then follows this distinct statement, viz.:

"The limitation of time as to the grant would not be cause to oust the license if the municipality persists in granting the right of occupancy and of use. As to the effect upon the license of granting

an additional period of occupancy and use, which may be *ultra vires*, we have found no authority directly bearing on the point," etc. But the opinion cites approvingly the three following causes, viz.: City vs. Telephone Company, 40 An. 41; Railroad vs. City, 46 An. 526; Dartmouth College Case, 4 Wheaton, 518.

In our view, that opinion treats the subject as though the city had the right accorded her by the charter to *lease or license the right of occupancy and use of the batture*, whereas the statute confers the power on the city to "lease or farm out the *wharves* and landings," and "construct and keep in repair the sheds over the *wharves*," alone.

It is elementary that "the use of the banks of navigable streams or rivers is *public*." R. C. C. 455. That the banks of the Mississippi river is a *locus publicus* in which the entire public have equal rights, irrespective of the ownership of the adjacent property, or the rights of the riparian proprietor of the soil. R. C. C. 509.

The Code declares:

"Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works." *Id.* 665.

It further declares that "works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which *obstruct, or embarrass the use of these places, rivers, streams, or their banks, may be destroyed at the expense of those who claim them*, at the instance of the corporation of the place, or any individual of full age residing in the place where they are situated." *Id.* 861. (Our italics.)

Giving to these provisions of the Code a just and reasonable interpretation, we think the conclusion is irresistible, that the ordinance in question runs counter to the law in attempting to give the defendants a right to erect permanent structures upon the batture which will *obstruct and embarrass* the free use of a public servitude, and to maintain the same in perpetuity.

This court has had frequent occasion to construe and enforce the foregoing provisions of law, and among numerous cases the following may be cited, viz.:

In *Mayor vs. Magnon*, 4 O. S. 2, the case was that of the defend-

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ant having erected a shed on the bank of the Mississippi river, between the levee and the river, in order to carry on some work for the Spanish government, and as a place for the deposit of timber, who had enclosed a great part of the bank of the river near it for a shipyard; and Judge Martin, in delivering the opinion of the court, said:

"It appears to this court that the spot which the defendant enclosed is really a part of the common or public land, which is *out of commerce*, incapable of being alienated, and must ever remain free to the inhabitants and strangers; that the defendant can have no right, claim or title thereto, except in common with the rest of the community."

The city authorities ordered these structures to be abated, as a nuisance, and the defendant enjoined them from so doing. The District Court dissolved the injunction, and this court affirmed the judgment.

In *Trustees of Natchitoches vs. Cox*, 3 N. S. 140, this court affirmed a judgment decreeing the removal of a house which had been erected on the bank of Red river within the limits of the city, on the ground that same was a nuisance, having been placed directly on the "bank of a navigable river, and that it interrupted that use of it which is common to all men. *Partida* 3, 28, 7; *Curia Phillip-pica*, lib. 3, Cap. No. 16."

In *Henderson vs. Mayor*, 3 La. 563, the court affirmed a judgment directing the removal of wharves, sheds and steam saw-mills which had been erected by the front proprietors on the alluvion of the river in such manner as to "obstruct a free passage on its bank," on the ground that same constituted a public nuisance; and in the course of their opinion "in relation to the third point, in which it is asserted that the works constructed by the plaintiffs are not incumbrances on public or city property," the court said: "This may be true with regard to the ownership. But if the public or the inhabitants of the city have a right to the use of the places incumbered and the works thereon erected impede and interrupt this public use they may be considered as nuisances. The right of way reserved in the grants of land fronting on the Mississippi, which authorizes the proper authorities to lay out and cause public roads to be made on the banks of the river, does not destroy the right of alluvion vested by law in the riparian proprietors. Yet while such roads remain

appropriated to public use no person, not even the proprietor of the adjacent soil * * * would be permitted to erect buildings or make any works thereon, having a tendency to impede passengers, or in any manner interrupt the public use of the road. Such works would constitute a nuisance, and might lawfully be abated or destroyed by orders from the police authority of the place where they existed, or perhaps by any private individual."

The case of *Shepherd vs. The Third Municipality*, 6 R. 349, was that in relation to certain valuable saw-mills, and the court said:

"The street and the banks of the river are *loci publici*—out of commerce—and the municipal authorities are bound to see that the use of them by the public be not obstructed; but they *have no power to allow any erection thereon which may render their use incommodious. They may, indeed, temporarily tolerate works thereon, which they may deem not injurious to the rights of the public; but no permission of the council can prevent a subsequent council from putting an end to such toleration.*" (Our italics.)

In *Harrison vs. City Council of Lafayette*, 18 La. 295, the plaintiff enjoined the city, and claimed that the city had no legal right to order the demolition and destruction of their houses, stores and buildings, which the evidence showed had been built of brick on the banks of the river, "*outside of the front street or highway, and between it and the river,*" but this court reversed the judgment of the lower court sustaining plaintiff's demand and dissolved the injunction and dismissed the suit.

The case of *Herbert vs. Bensen*, 2 An. 779, was that of a warehouse which had been erected by the defendant on a portion of the quay in front of the plaintiff's house on Bayou Teche, with the consent of the City Council of the town of St. Martinsville, and which the plaintiff sought to have abated as a nuisance, and the court said:

"It is conceded by the defendant, in his application to the corporation, that the place upon which the warehouse was proposed to be, and was subsequently built, was a public place. It has been so often and so uniformly held by the former Supreme Court that the places within the limits of a corporation can not be appropriated to private use, and that individual corporators, as well as the officers of the corporation, have the right to prevent such appropriation and to sue for the demolition and removal of buildings erected on them by individuals, that the question can no longer be considered an open one. Art. 859

of the Louisiana Code, which provides that corporations of cities, towns and other places may construct on the public places, in the beds of rivers and on their banks all buildings and other works which may be necessary for public utility, for the mooring of vessels and the discharge of their cargoes, *does not authorize the erection of buildings for private emolument.*" (Our italics.)

Carrollton Railroad Company vs. Winthrop, 5 An. 36, was a similar case.

In McKeen vs. Kurfust, 10 An. 523, it was held that a cotton shed built on the bank of the Mississippi river which prevented the public from depositing their goods upon the same at the usual stage of high water was an obstruction to the use of the banks by the public and removable summarily as a nuisance.

In Sweeny vs. Shakspeare, Mayor, 42 An. 614, the proof showed that the plaintiff had leased from the Texas & Pacific Railroad Company a portion of the batture in front of its riparian property on the Mississippi river, in front of the city of New Orleans, and had thereon established certain piles and clusters of piles, for the purpose of protecting certain hitching posts for the purpose of securing his barges and boats laden with coal, an article which he was engaged in selling to the public; and we held that he was "without right or authority to build houses on the batture, and rest their foundations upon piles driven in the ground. This was an evident appropriation to his exclusive use of the river bank, in direct violation of the right of control and administration which is vested in the city."

In Ruch vs. City, 43 An. 275, all of these principles were examined with care and affirmed.

But it is contended by defendant's counsel that a different doctrine was maintained in Watson vs. Turnbull, 84 An. 857, and one that favors the theory for which they contend.

In that case the court employed this language, viz.:

"Within its corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage and administer the use of the river banks for the public convenience and utility; to establish wharves and landings, to erect works, and provide facilities for the use of vessels and water crafts; and to charge just compensation therefor."

But that opinion just as emphatically announces, and we desire to emphasize the statement, that "riparian proprietors have no

right to appropriate to their *exclusive use* these banks, and they have *no private property in the use thereof, which is public.* (Our italics.)

This decision in no manner impeaches the authorities cited, and announces no contrary doctrine, in our conception.

But counsel particularly attract attention to that part of that opinion which reads as follows, viz. :

"The discretion of the city authorities in determining what are proper and needed facilities to commerce, and on what part of the river bank within her limits they should be established, is manifestly not a proper subject for judicial control or interference.

But we do not understand the "facilities to commerce" therein referred to to mean such permanent structures as elevators, warehouses and the like, for the exclusive and gratuitous use and occupancy of a single corporation for a period of ninety-nine years.

The question at issue in *Watson vs. Turnbull* was whether a riparian proprietor within the limits of the city of New Orleans could restrain the city by injunction from placing hitching posts along the river bank in front of their property, with the view of establishing a landing place, and furnishing facilities for the landing, fastening, etc., of coal boats and other water crafts, and the ground assigned for the injunction was that "there existed no necessity of commerce requiring the placing of these posts; that the plaintiff had already placed, at their own expense, all such posts as were required; * * * and that the said action (of the city) would obstruct the free use of the banks of the river, and cause deterioration in value to the property of complainants."

It is striking, that the question presented and decided in that case was altogether a different one from the one we have at the bar, and that the "facilities to commerce" there treated of are those exclusively relating to the landing and fastenings of coal boats and other water crafts, a matter of administration, pure and simple.

It was quite a similar case to that of *Sweeny vs. Shakespeare*, *supra*; and the contention of the plaintiff in that case (*Watson vs. Turnbull*) was exactly the opposite to that of defendants in this case.

Surely, that opinion is not authority for the proposition that the City Council has power to grant to a railroad company permission to take possession of *all* the batture in front of its riparian property for

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the space of a half mile or more within the limits of the city; establish thereon permanent structures and build wharves and landing places for vessels, and *exclusively* use, operate and maintain the same for a period of ninety-nine years, without adjudication, competition or compensation.

The same question again arose in *Pickles vs. Dry Dock Company*, 88 An. 412, same being an action on the part of a lessee from the city of New Orleans of the Third District ferry across the Mississippi river, to compel the defendant to remove certain illegal obstructions it had placed upon the river bank interfering with the exercise of his franchise.

The contention of the defendant was, that it had "the right to locate their docks and drive piles in the bed of the river because it was a riparian proprietor of the soil in front of the dock, and that it had thus located its dock and driven the piles in pursuance of an ordinance of the police jury of the parish of Orleans," and in disposing of that contention the court said:

"Numerous decisions of this court, in perfect harmony with general jurisprudence on similar questions, have placed beyond the domain of possible discussion the doctrine, that a city vested with the powers enumerated in the charter of the city of New Orleans has the undoubted and necessary power to *regulate the use of the banks* of a water course on which it borders," etc., citing *Watson vs. Turnbull*, thus placing upon that case the interpretation that the question dealt with and determined was the power to *regulate the use of the banks of the Mississippi river* and nothing more.

And as if to emphasize that statement, the court said further:

"It is now well settled that the general right of the city (to regulate the use of the banks of any water course) *must be modified by municipal regulations when adopted in conformity with chartered authorities.*"

In *Heirs of Leonard vs. Baton Rouge*, 89 An. 275, plaintiffs sought, as owners of riparian property, to recover from the defendant a strip of batture in front of the city, under the provisions of Revised Statutes, Sec. 318, as not being needed for the public use; and the city defended partly upon the ground "that in the exercise of her corporate powers, and to provide a revenue, lessen the burden of taxation and to increase the facilities of trade in the article of fuel, which is one of prime necessity, she permitted a landing for

coal in front of Leonardtown, where boats and barges are moored; and that for the privilege she has charged an annual rent."

Upon an examination of the evidence we found that the coal-chute spoken of rested on trestles, and was used for the purpose of transferring coal from barges on the Mississippi river to the cars on the bank.

In the course of our opinion, we said:

"The defendant has not built, nor permitted to be constructed, upon the space in controversy any *permanent* structure. The city claims that she only permitted and allowed certain constructions and embankments to be made from the bed or sloping bank of the river, between high and low water mark, in the interest of the commercial prosperity of the town, and to meet the *actual wishes of the people*."

And, in the opinion on rehearing, the court said further, that the land in question was "necessary for public purposes, and is used for purposes of a public character through the medium of private parties, who act under the city authority *only temporarily granted*. The uses are as a landing, wharf and storing place for coal for the purpose of facilitating the reception and distribution of fuel to the inhabitants at reasonable prices, which are regulated to a certain extent in the ordinance."

"The public character of such uses is not destroyed by the fact that they are temporarily farmed out to particular individuals. Cities exercise, without question, the right of designating particular portions of their wharves and landings for the use of certain lines of vessels, or for the reception of certain kinds of commodities; and the power here exercised is of that general character"—that is to say, the power of administration.

The principles announced in that decision are in strict accord with those of *Watson vs. Turnbull* and *Pickles vs. Dry Dock*, but they are diametrically opposite to the following contention of the defendant's counsel, viz.:

"So far as constructing elevators, buildings, sheds, railroad tracks, etc., on the batture is concerned, the plaintiffs leave out of sight entirely the fact that this ordinance is, upon its face, a mere *license to riparian proprietors to use a portion of the batture which (they) own*; that under the provisions of Art. 318 of the Revised Statutes, adopted in 1853, *any riparian proprietor within an incorporated city or town, even a private citizen, who owns batture, may*

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compel the (municipality) by suit to set aside for his private uses so much of the batture as may not be needed for general public purposes."

In our view, counsel has altogether misapprehended the plain intendment and true import of that statute, as will be seen from our opinion in *Heirs of Leonard vs. Baton Rouge*, just adverted to.

It does not confer upon a riparian proprietor the right to *carve out* a segment of the river front, and appropriate it *exclusively to his own use*; but it, on the contrary, confers on him only the right to require the city to yield up a portion of the soil of a river bank, of a recently formed batture, when there is more than is needed for public use, leaving the possession and dominion of the remainder, which immediately fronts the river, undisturbed.

In our opinion, that is exactly what the terms of the ordinance purports, for those of the first section declare in plain and unmistakable language, as follows, viz.:

"Permission and authority are hereby granted to the said companies, their successors and assigns, to occupy for *their* uses and purposes for the period of ninety-nine years from the date hereof, *all that part of the batture* lying between Toledano and General Taylor streets, fronting the property owned by either of said companies," etc. (Our italics.)

The grant is further supplemented by those of the second section, which provide that the defendants as grantees are "authorized to construct, maintain and operate upon (said batture) such wharves, docks, piers, bulkheads, elevators, warehouses, sheds, buildings and appurtenances as *the necessities of their business may require*," etc.; that is to say, such permanent and enduring structures as may be required to effectuate the aforesaid right of permanent use and occupancy of said batture.

And still further to supplement the aforesaid grant, it is provided by Sec. 4 "that all steamships, vessels and other water craft, receiving or discharging cargo at said wharves *for either of said railroad companies*, or any steamboat, ship, vessel or other water craft using said wharves *by and with the consent of said companies shall be exempt from the payment of all wharf dues*," etc., thus discriminating against all steamboats, ships, vessels or other water craft not receiving, or discharging cargoes for either of said corporations, or with their consent; and giving to said corporations the exclusive use of such

wharves, docks, piers, bulkheads, elevators, etc., as they shall establish on said batture.

And to point and fortify the foregoing terms of the aforesaid grant, the concluding portion of said section declares that same shall not have the effect of "exempting steamships, vessels and other water-craft from wharf dues for receiving and discharging cargoes at or occupying any *other* wharf"—the purport of that clause being that any vessel, of any description, trading or dealing with the defendants, or with their consent, at said wharves and landing shall be exempt from the payment of wharf dues to the city or to the defendants, and that all other vessels of any and every kind and description, doing business at *other* wharves and landings of the city should not be exempt therefrom.

It does not require argument to prove that this ordinance yields up to the two defendants for a period of ninety-nine years, not only the *exclusive use and occupancy of all batture in front of their properties* on the Mississippi river between Toledano and General Taylor streets, but also the *exclusive control* of the wharves, docks, piers, bulkheads, elevators and appurtenances thereon for a like period of ninety-nine years.

Manifestly, if this ordinance be maintained there would remain to the city no right of supervision or use of either batture of this particular segment of the city or the wharves or their enjoyment. Her control over them in the interest of or for the benefit of the public would be entirely lost for a period of ninety-nine years—that is to say, in perpetuity.

The question propounded by this suit is whether the city can lawfully thus give away the use of all the batture and the control of the wharves and surrender the right to collect wharf dues of all vessels dealing at the wharves and landings of the defendants, while collecting from those doing business at all other wharves and landings.

If this ordinance is beyond the power of judicial revocation and annulment, the defendants will no doubt, during the limited period of ten years, have erected upon the batture spacious, expensive and permanent buildings and structures, such as elevators, warehouses, docks, piers, etc., and will have established thereon connections between them and their wharves and landings. They will have constructed railroad tracks along the whole length thereof, crossing all intervening streets, and accompanied with sidings, switches and

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turn-outs, such as are usual, convenient and necessary for terminal facilities of two great transcontinental systems, which the defendants represent.

There is, in our conception, no authority for the proposition, either in the ordinance or the law.

The Civil Code provides that "the corporations of cities and towns and other places may construct on the public places, in the beds of rivers and on their banks, all buildings and other works *which may be necessary for public utility*, for the mooring of vessels and the discharge of their cargoes, within the extent of their limits" (Art. 868); but this provision of law does not authorize the city to build permanent structures on the batture or banks of navigable rivers for the exclusive enjoyment and use of private individuals or corporations, or to grant them permission to do so.

But there are some authorities which have been cited and relied upon as supporting the theory contended for by the defendants, and which should not pass unnoticed.

One of those cases is *Ellerman vs. Morgan's Railroad and Steamship Company*, 34 An. 898; but that decision, in our view, presents an altogether different question.

The plaintiff, Ellerman, like the Construction and Improvement Company in this suit, was the farmer or lessee of the public wharves of the city and sought to compel the defendant to pay wharfage; and the latter resisted, upon the ground, amongst others, that "the right to build and use wharves, was conceded to them and to their vendees by the State of Louisiana, and that the concession was a consideration or inducement for the building of the railroad, and constitutes a contract, the obligation of which can not be impaired." And the opinion shows that under a city ordinance then existing, the right of the wharf lessee to collect wharf charges was restricted to the wharves and piers which were "furnished by the city;" and that, as the wharves in question had been built by the defendant nothing was due the plaintiff. Citing *Cannon vs. New Orleans*, 20 Wallace, 577; *New Orleans vs. Wilmot*, 31 An. 55.

But aside from that proposition, the railroad company based its exemption from the control of the city on a contract made with the State as a sovereign, in whom the police power is vested, primarily. The city was without power to make such a contract.

And in *Cannon vs. New Orleans* the court said:

"It is a doctrine too well settled, and a practice too common, and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures"—the wharves—"erected by individual enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely added, also, that it is within the power of the *State* to regulate this compensation, so as to prevent extortion, a power often very properly delegated to the local municipality."

The principle announced in that case is very well illustrated in *Railroad Company vs. Ellerman*, 105 U. S. 166; which reviews the opinion of our predecessors in *New Orleans vs. New Orleans, Mobile & Chattanooga Railroad Company*, 27 An. 414, involving the same subject matter as the *Ellerman* case. *Vide supra*.

That decision may be fairly summarized as follows:

The railroad company having secured the passage of an act of the Legislature in 1869, granting it the right "to enclose and occupy for its purposes and uses" a portion of the batture on the river in front of the city of New Orleans, erected upon same wharves for the use of vessels and maintained same at its own expense.

Claiming as lessee of the city under a contract of 1875, the plaintiff enjoined the railroad company from the further use of the batture, levee and wharves as proposed, alleging that it had their *exclusive administration*.

In stating the claim of the wharf lessee, and what the decision of the court in 27 An. 414 was, the Supreme Court said:

"What that decision did affirm, however, was that the disposal of the public right on the premises, as a wharf, was in the *State*, to the exclusion of the city, so that if the joint resolution (of the Legislature) had been a cession to a natural person as riparian proprietor, to improve the premises as a landing place for water craft and for loading and unloading cargoes by building levees and wharves at his own expense, with the right to charge reasonable wharfage for their use, it would have been conclusive upon the city and those claiming in its right. And construing the grant to the company as limiting the use of the property as a wharf to purposes strictly incident to its corporate business, still, in order that it should be beneficial to that extent, it would be essential that the company should have the right to exclude all other uses, and this would effectually withdraw it from the jurisdiction of the city authority over the general subject of the public wharves.

"Neither would this be in derogation of any vested right of the city. Whatever the power the municipal body rightfully enjoys over the subject is derived from the Legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually required in the course of administration."

The judgment of the court rejected the demand of Ellerman, and maintained the *exclusive* right of the railroad company to use the wharves and landings, which it had constructed upon batture in front of its riparian property; but the opinion is rested entirely upon a *grant by the Legislature* to the company, prior in date to that of the lease of the plaintiff from the city—holding that this legislative grant effectually withdrew the use of the wharves and the right of the city to administer them "from the jurisdiction of the city over the general subject of the public wharves."

The opinion further affirms that "whatever power the city enjoys over the subject is derived from the State, and that they are purely administrative and revocable at the will of the City Council."

But the court was guarded in making that statement, and coupled therewith the declaration that the revocation of any administrative function which the municipal authorities had granted to a private individual or corporation, such as the use of the wharves, "would, of course, not touch any *property* of the city actually acquired in the course of administration."

And, by analogy, the city would, in case of revocation of a grant, be under equal obligation to save the property of the grantee.

Applying the principles announced in that case to the one at bar, it is evident that this court can not affirm the legality of the ordinance under consideration, as it is founded upon neither a legislative grant nor legislative authority; and because the city has, under its charter, only a power of administration of the batture for the public.

But it must be observed that the Legislature did not grant to the railroad company, in the case cited, any such right or privilege as this ordinance proposes without the sanction of legislative authority.

Attention has been attracted to the opinion of this court in *City vs. Telephone and Telegraph Company*, 40 An. 41; but we do not think it is applicable.

It involves no question of servitude upon a riparian estate or batture, or wharfage; but the permission of the city, granted "to the defendant to construct and maintain telephone lines on its streets."

But the city ordinance was authorized by a special enabling act of the Legislature. Act No. 124 of 1880.

The provisions of that act were not only consulted by the court in the preparation of their opinion, but they were incorporated in it.

Also, to the case of *Stephens vs. Walker*, 15 An. 577.

The wharf and warehouse under consideration in that case were erected upon the banks of the Bayou Teche, in front of a public square, with the sanction of the council of the town of Franklin; but these constructions were authorized by a special act of the Legislature of 1857; and the plaintiff found it a necessity of his case to urge the unconstitutionality of the statute.

Of that question the court said:

"If the effect of the legislation was to defeat the rights of the public by a transfer of the public property to the exclusive use and control of private individuals, the position assumed by the plaintiff would not be without force.

"But the statute is susceptible of a different construction, and does not, in our opinion, confer such unlimited powers upon the municipal authorities. The erection of the wharves and buildings, instead of being detrimental, must necessarily be subservient to commerce; *otherwise the privilege is abused*, and the courts will grant the public adequate remedy." (Our italics.)

Likewise to the opinion of the Supreme Court in the *Trustees of Dartmouth College vs. Woodward*, 4 Wheaton, 518.

In that case it was ascertained and held that the British crown had granted a charter to the college in 1769, prior to the establishment of the government of the United States, which the revolution did not dissolve, and that the subsequent statute of the State of New Hampshire altering same without the consent of the corporation was an attempted impairment of a contract which was protected by the United States Constitution.

And finally, to the decision in *New Orleans vs. Louisiana Construction Company*, 140 U. S. 654. In that suit was involved the question whether the city had so changed the character and destination of a portion of the batture in front of four of its public squares as to render same liable to seizure under execution—the contention on the part of the plaintiffs in that case being that the city had made a *locus publicus* private property through the instrumentality of an ordinance which provided for the shelter and protection of the sugar and

molasses received at the port of New Orleans, the terms of which granted defendants the exclusive right to this use for the term of twenty-five years.

The court held that the grant did not have that effect.

But the ordinance provided that the contemplated sheds should not approach within one hundred and fifty feet of the wharves in front of the sugar landing; and it specifically provided that, at the end of twenty-five years, the city was to have the option of terminating the lease and taking the sheds at half their appraised value, of extending the same for a further period of fifteen years, at the end of which they were to revert to the city.

Upon a careful study of these cases we have been unable to discover in them anything contrary to the opinions of this court we have collated above.

But the contention of plaintiff's counsel goes further. It directs our attention to certain provisions of the Constitution, which he argues, and with force and plausibility, render it very doubtful whether the Legislature *could*, constitutionally, exercise the authority of enacting a law enabling the city to pass and promulgate such an ordinance as the one under review.

Among the number we may cite the following, viz. :

"The General Assembly shall have no power to grant, or to authorize any parish or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor; nor pay, nor authorize the payment of, any claim against the State, or any parish or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." Const., Art. 45.

"The General Assembly shall not pass any local or special law on the following subjects, viz. :

* * * * *

"Granting to any corporation, association or any individual any special or exclusive right, privilege or immunity." *Id.* 46.

"The General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to the State, or to any parish or municipal corporation therein." *Id.* 57.

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"The exercise of the police power shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State." *Id.* 285.

"And, finally, the Constitution provides that no monopoly or exclusive privilege shall *exist* in this State," etc. *Id.* 248. (Our italics.)

A mere casual glance at the foregoing constitutional provisions suggest a manifest incompatibility between them and a legislative act of the purport of city ordinance 11,765.

In any light in which that ordinance can be viewed, in our opinion, it seems to be utterly illegal and *ultra vires*, and can found no right in, and secure no privilege to, the defendants.

Entertaining this view, we are of the opinion that plaintiffs' petition states a cause of action, and that the judgment appealed from should be reversed, and the cause be remanded for a trial upon its merits.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the cause be remanded to the lower court to be therein proceeded with according to law and the views herein expressed.

And it is finally ordered and decreed that the costs of appeal be taxed against the defendants and appellees, and those of the lower court await final judgment thereon.

NICHOLLS, C. J. I concur in the decree.

CONCURRING OPINION.

MILLER, J. This case is here only on an exception of no cause of action. It is a suit by citizens and taxpayers assailing, as an illegal encroachment of the public right, an ordinance of the council disposing of the batture. If, in any respect, the case discloses a cause of action the case must go back. Our courts have recognized the right of action of the citizen in controversies of this nature, but, if we are to deal with the important questions discussed at the bar, it will be far better to have an appeal on the merits.

The ordinance proposed to grant to the railroad company all the batture between General Taylor and Constantinople streets, in front of the property owned by the companies, of which frontage we have no knowledge, for the period of ninety-nine years, to build wharves,

buildings, warehouses and appurtenances for the uses of the companies.

A long line of decisions has affirmed that the municipal authorities have, in respect to that space defined as between the front row of houses or property line, or Front street to the river, only the administrative function, and no power of alienation. In the charter, the measure of all power the city can exert, it is difficult to find the authority for this ordinance, dealing with this batture.

It is said the ordinance proposed no alienation. If by this is meant that the ninety-nine-year feature distinguishes it from a conveyance, it seems to me the difference is one of phraseology. That public uses are defined in the Code needs no discussion. The ordinance gives all the rights of occupancy and enjoyment for the uses of these companies that ownership can convey.

Our law makes liberal provision for the withdrawal, on the demand of the riparian owner, of such part of the batture on his front as may have become unnecessary for the public use. If the city itself is the front proprietor, it can exact the same right of withdrawal conferred on all riparian owners. This provision, it seems to me, would afford the companies the method entirely within the law of utilizing the front property and batture the ordinance states they own. Whenever batture is withdrawn enough must be left for public use. This ordinance takes all, and practically for all time. Whether accretion in the future expands this batture, or the encroachment of the river diminishes the area, the ninety-nine-year ordinance is to stand an impediment, I think, to that control of public places, apt to become requisite, conferred on the council for the public good, and with which, I think, the city can not part.

A few years since we witnessed the sale under execution as private property, of part of the public levee on which the city had authorized the erection of sheds to shelter products landed on the levee. The Supreme Court of the United States annulled the sale, announcing in its opinion that which is not at all novel to us here, that the council clothed only with the power of administration had no power of alienation of the public levee, nor had it by that ordinance undertaken to do so. The principle of that decision is pertinent in this discussion.

With the limitations given full force, on the power of the council with respect to batture, the line of my investigation has left no doubt

on my mind of the competency of the council to give to railroads or other corporations connected with our commerce, privileges to build and maintain wharves, elevators, docks or other constructions on the batture or extending into the river, of a character to serve the uses of commerce. Such privileges have been of constant recognition. It is not within the province of our opinion only on the exception to say more as to such privileges, their scope or as to the supervision they imply of the city authorities. I have endeavored to say briefly what the discussion here seems to invite, and thus indicate my view in general propositions as to this ordinance.

I concur in the decree which simply remands the case for trial on the merits.

DISSENTING OPINION.

BREAUX, J. The Louisiana Construction and Improvement Company, one of the appellants, claims to have a *locus standi* in court for the reason (it alleged) that it has complied with its contract as farmer of the revenues of the public wharves; that performance on its part involved the necessity of making large improvements and annually expending large amounts; that one of the covenants of the contract required the wharfage should not be charged at any of the wharves and landings improved for or by the city, and that, in consequence, the grant herein involved is illegal. In addition to this special ground the appellant company and three other taxpayers represented that the city of New Orleans unlawfully attempted to grant to the Illinois Central Railroad Company and to the Yazoo & Mississippi Valley Railroad Company for the period of ninety-nine years the public batture on the banks of the Mississippi river, between Toledano and General Taylor streets, fronting property owned by the defendant companies between these streets.

The preamble of the ordinance assailed, sets forth the purpose to extend the commerce of the port and facilitate the business of the defendants, and to that end the body of the ordinance grants permission and authority to the defendant railroad companies, to occupy for their use and purposes, the batture, for the period alleged by the plaintiffs; they (the defendants, common carriers) are also authorized to construct thereon wharves, docks, piers, bulkheads, elevators, warehouses, sheds, buildings and appurtenances at their expense, and they are required to conform, as nearly as possible, to a stated

standard in the construction of the wharves; the other improvements, by the terms of the ordinance, include steam locomotives and other motive power. These are to be located upon the wharves and along the wharves on the river front between the streets before named, with the further right of crossing intervening streets and of connecting the tracks, switches and turnouts with the track of the New Orleans Pacific Railroad Company on Water street and with the wharves, docks, elevators and buildings that the defendant company may construct upon the batture and upon their property; they are also authorized to operate a single track, with necessary switches, sidings and turnouts from certain points designated in the ordinance.

The ordinance exempts steamships and other water craft receiving or discharging cargo at these wharves for either of the defendant companies, or with their consent, from the payment of wharfage dues. In other words, in the language of Sec. 4 of the ordinance, all water craft "receiving or discharging cargo at said wharves for either of said railroad companies, or any steamships, vessels or other water craft using said wharves by and with the consent of said railroad companies, shall be exempt from payment of all wharf dues; but this shall not exempt steamships, vessels or other water craft from wharf dues for receiving or discharging cargo at or occupying any other wharf."

The defendants pleaded several grounds of exception and the exception of no cause of action in the alternative, which was sustained by the District Court.

I pass without comment, as it would serve no purpose in support of my conclusion, all the grounds pleaded, save those included in the plea of no cause of action.

THE SPECIAL INJURY AVERRED BY ONE OF THE PLAINTIFFS.

First, it is insisted that the Louisiana Construction and Improvement Company, in its individual capacity, is exposed to personal injury, which, it alleged, it sought to avert by intervening in this suit and by joining the other plaintiffs who are resident citizen taxpayers of the city of New Orleans.

This intervening company is lessee of the public wharves and landings of the city from Toledano to Piety streets (a distance on the river front not included in the license to the defendant railroad companies) for the term of ten years from the date of the lease.

It alleges substantially that the wharf charges agreed upon between it and the city embraced a rate of charges for all wharves; those to be charged by it and those to be charged by the city, outside of the limits of the territory included in the lease.

It also alleged that it agreed to these conditions, and subsequently expended large amounts in the construction of wharves and other improvements of the public landings, thinking (it averred) that the wharfage dues (if charged) would reimburse it for the large expenditures made.

It urged that the city has violated its contract by gratuitously allowing to the defendants a portion of the public landings above the territorial limits of its own grant.

It appears to me that the right granted to the Louisiana Construction and Improvement Company was confined by the words of the act granting the right to the shores designated in the lease, but, conceding for the moment that the letter of the act is as extensive as it is claimed by this company, the interpretation is impossible that would entitle the farmer of the revenues to control the rate of wharfage of wharves not within the territorial limits covered by the lease.

The city was without the power to make such an agreement. Railroad vs. Ellerman, 105 U. S. 166-174.

But I have conceded more than the act of lease grants to the Louisiana Construction and Improvement Company. After a careful reading of the many sections of the act, I am convinced that it was not the intention of the city to transfer to this company the right to control the rate of charges at other wharves than those expressly leased. There is no express stipulation in the contract of lease regarding the city front not leased; without such a stipulation it would be difficult to conclude that the unleased portion was subjected to the same charges for wharfage without regard to the will of the municipality. In my view, the lessees did not acquire the right to control the rate of charges on the river front not leased to them.

THE CITY HAS NOT ALIENATED A PUBLIC RIGHT.

The next proposition relied upon by the appellant is, that the city of New Orleans was without power to destroy or change a public servitude and deliver a portion of the shores to the dominion and control of private corporations.

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In view of the facts I do not think this proposition can be sustained.

The city has granted a license to a corporation to use a portion of the banks of the river. It does not hold from the city a right at all, translative of property. The dominion is not illegally affected by the ordinance assailed. The property remains the property of the riparian owners subordinate to the servitudes imposed for public utility.

WITHIN CONSTITUTIONAL LIMITATIONS.

Another objection urged by the plaintiff against the ordinance assailed is, that it was contrary to Arts. 45 and 56 of the Constitution prohibiting the public authorities to "loan, pledge or grant" any property of the State or city to any person or corporation, public or private.

The word "grant," as employed in the article of the Constitution, does not include a mere "permit" or "license." They are public works.

In lieu of wharfage dues the city elected to accept additional facilities to commerce on the line indicated.

I do not think that the license has anything about it of the gratuitous, and that is "the grant" which the Constitution prohibits; the purpose was the improvement of the port and additional facilities to public commerce.

POWERS DELEGATED TO THE CITY.

Another objection of the plaintiff is, as I interpret, that no authority was given to the city, in any case, and for any purpose, to grant a license as here granted, and that it was never intended to grant or to let any public battures, or river bank for any purpose for a period longer than ten years, nor to authorize any one to impair or destroy the right of government of the general public.

May it not be said in answer to plaintiffs' last clause of the objection, that the city has not impaired the rights vested in third persons, or destroyed any common right, by authorizing repairs at a designated point on expressed conditions. The ordinance has only modified the use. The improvements permitted are public.

Reverting to the alleged want of delegated power in the Council urged in the first division of the objections I am considering, it must be taken for granted that no one will assert that the city

did not have control and management of the wharves, landings and quays.

Under this grant of power the corporation may adopt such means as are required in the interest of proper control and good management. Was it not within the power granted of legitimate control and management?

In *Schwartz vs. Flatboats*, 14 An. 240, 244, I find an affirmative answer. The farming of markets, port dues, and other similar acts, said the court, are acts of administration. The public is the great usufructuary; the corporation is the administrator, and as such has the power to "license" and "permit" the use as was proposed by the ordinance assailed.

In addition to the delegated power of administration, there are special powers delegated.

The council may farm out the wharves. Why should not this power cover or include the secondary right of granting a license?

Quod minimum sequendum est.

Again: the city unquestionably had the power to refuse to riparian owners the right to erect wharves.

Upon this point it has been decided that a power to refuse to riparian owners the right to construct wharves included the additional power to grant the right. *City of Baltimore vs. White*, 2 Gill. 459.

It has even been treated or considered as one of the implied powers of a corporation.

"In the earliest times of the colony before the passage of any ordinance upon the subject wharves were built by the proprietors of land bounding on the sea by permission of authority of the towns." *Gray's Reports*, Vol. 8, p. 514.

Lastly on this point: "The corporation had the exclusive right to determine when and to what extent the riparian proprietors might take possession of the batture." *Remy vs. Municipality*, 12 An. 500.

LIMIT OF LICENSE AND WANT OF ADVERTISEMENT.

Other grounds relied upon by plaintiffs are that the limit of the license, ninety years, and the failure to advertise the grant for sale and invite competitive bidders, affected the grant with nullity.

The riparian ownership of the shores of waters is of great antiquity

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and from the earliest period in the history of civil law that ownership has carried with it rights and privileges not enjoyed by third persons.

In the Institutes of Justinian it is announced with oracular brevity:

Præterea quod per aluvionum agro flumen adjecit jure gentium nobis acquiritur—i. e., whatever the river has added to your lands becomes yours.

The principle governs in matter of the banks of the river here, as it applied to the borders of the Tiber under the reign of Augustus.

But the right of the owner is subordinate to a servitude, imposed for public or common utility. O. C. 665.

In our view, however, the municipal authorities may grant to him a right or privilege on the river banks immediately in front of his lands, that they might properly deny to one who is not the owner of the adjacent lands, provided always so as not to work an injury to the public.

“The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled.” Railroad Co. vs. Ellerman, 105 U. S. 166-174, citing, approvingly, 5 An. 661; 15 *Id.* 577; 22 An. 545; 6 N. Y. 523; 26 *Id.* 287.

In the first cited case, it is true, the State was the grantor of the right to maintain wharves to the riparian owner.

In this case the right of maintaining wharves and of controlling the public battures by legislative grant was in the city. The city is authorized to maintain wharves and control the batture.

With reference to the term of the license, if it be an issue here, I have already stated, the power the city now has of passing an ordinance authorizing the lease of the wharves covers a similar power as to a license. The city having the right to let for ten years, has the power to issue a license at least for that length of time.

The result is that the plaintiffs show no cause of action during the ten years from the date of the license. The cause will arise if at all after that period.

For the purpose of illustrating: A riparian owner authorized by the municipality to build a wharf, or to construct other improvements beneficial to navigation in front of his property, stipulates that it shall remain under his management, subject of course to municipal supervision, for a stated number of years.

Let us assume that, as to term, the municipality has exceeded its

powers. A number of taxpayers sue to have the constructed works removed as a nuisance and the occupant ousted.

Those suing, in so far as relates to nuisance, would find no support in *Stevens vs. Walker*, 15 An. 577, in which "nuisance," in a similar case, was discussed and a principle in connection therewith announced. The limitation of time as to the grant would not be cause to oust the licensee if the municipality persists in granting the right of occupancy and of use.

But time is not an issue. We have noticed it only because it was earnestly argued for plaintiffs. Term is not of the essence or of the nature of a license. It is an incidental stipulation. C. C. 1764.

The question regarding the term has been passed upon by this court adversely to the position of plaintiffs in this case. *City vs. Telephone and Telegraph Company*, 40 An. 41-47.

The court declared that the grant was perpetual. This case was approvingly referred to by this court in *Railroad vs. City*, 46 An. 526 and 529, citing also the leading *Dartmouth College* case, 4 Whar-
ton, 518.

The first cited decision *supra* and the opinion subsequently affirming it are more than ample to sustain my own position, more limited in its scope and effect.

In conclusion, on this point, it does seem to me that under its powers of administration, and its other "special" powers, to which I before referred, a large commercial city watered by a noble river, near the sea, has the authority to permit the riparian proprietor, for a limited time, to take possession of the batture and wharves for public use.

As relates to the want of advertisement and alleged failure to offer the privilege for sale by auction, the law invoked applies to the leasing or selling of the wharves and landings.

It is different in matter of this license. The city has not parted with its right to govern and to see that the license is complied with in every particular in the interest of the public.

There is here no lease or alienation of any kind, requiring a sale, under charter provision.

LIMIT OF POWER.

I do not agree with the statement or share in the apprehension gravely and forcibly expressed at the bar, substantially; if the

ordinance now under consideration is legal, the river front on both shores of the river, within corporate limits of the city, may be disposed of without possible restraint of any kind.

Every ordinance must be reasonable and not inconsistent with the laws and public policy. The reverse of the proposition does not admit of argument. The license granted, we think, was both reasonable and consonant with public policy. It granted a privilege in which each, the city and the licensees, have an interest. The one in advancing the importance of its port; the other in increasing the volume of their business. Any ordinance, unreasonable and not in the public interest, as relates to public servitude, is not beyond the reach of judicial authority; such an ordinance, for instance, as would dispose of "both shores of the river without possible restraint of any kind."

This brings us to the question of an alleged franchise, which will, it is urged, destroy all other wharves or compel their maintenance by direct taxation. The argument at this point in the case is directed against Sec. 4 of the ordinance copied in our opinion. The argument at the bar was chiefly directed against the "consent" feature of the section by which the companies are authorized to permit other vessels than those receiving or discharging cargoes for them, to use their wharves.

This additional authority may have been intended only as a complement of the license, to enable the licensees to more freely exercise the right granted. In any view there is not an actual issue before us for determination. It will be time enough to decide this issue, suggested in argument, when an actual case will be presented. It may never arise.

The objection, even if well taken, is inapplicable to the remaining portions of the sections.

If, in litigation, hereafter, it be decided that the "consent" feature is illegal and void, the other portions of the section would not thereby be affected.

"It is true that a portion of an ordinance may be objectionable and the other portions may be good, and in such cases that which is good remains." *State vs. Mahner*, 48 An. 496, 500.

The ordinance as a whole was attacked. I have considered it in its entirety. If in the exercise of the right granted, the licensees, in minor details, should attempt to exercise rights, illegally to the

prejudice of other portions of the servitude on the river banks, it will be time enough to pass upon the actual case.

The following may, in a degree, illustrate and serve to suggest additional answer to the many questions raised in opposition to the ordinance.

Let us for a moment consider a new site. Imagine a new city lying on both sides of a navigable stream, guarded and protected on each side by a wall, with gateways at the foot of each street; with steps and inclines leading down to the river; with twenty-five gates on each side of the stream for ingress and egress, in imitation of the capital of the Orient on the Euphrates in the rich valley of that river of old. At all the gates save one dues are charged. At the gate excepted highly valued commodities, in which the public have an interest, are admitted free of all charges.

It would not be in the power of a few of the inhabitants of the city to cause the gate to be closed. To charge at one gate, all the gates being free, would be an illegal discrimination against the public; but to exempt one gate, though dues are collected at all the other gates, is not a discrimination against the public, but in favor of the public.

In the same way and for similar reason, if all the wharves were exempt from dues it would be unlawful discrimination to permit the defendant companies to charge at the wharf of which they have the use; but it is not unlawful, in my view, in a port where charges are generally collected to except a limited front for a purpose deemed useful and public by the municipality.

The following is a summary of the points from my view of the issues:

The defendant common carriers were legally authorized to maintain a free wharf for vessels connected with their business upon condition that improvements were to be made in the interest of commerce and industry. The use is public, and there was no invasion of any legal or equitable right of any one.

The right of the city as regards the borders of the Mississippi river is a right of regulation and management, broader than exists in case an individual is authorized to regulate and manage. It does not cover the right of alienation, but the city has not sold or leased the batture.

The funds, credit, property, or things of value of the State, have not been loaned, pledged or granted by the grant of a license

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to riparian owners, to modify the public use of the batture and wharves.

Under its delegated and implied powers the city has the right to pass an ordinance "to extend the powers of the port and to facilitate the export and import business" of corporations in the service of the public.

The license being legal and authorized is not made necessarily void as between plaintiffs and defendants by the period of ninety-nine years for which it was granted. The licensor does not object; on the contrary, insists that it is legal.

As to the necessity, under the law of advertising and inviting bidders, that applies to the alienation or lease of property, not to a license with a grant of use to the riparian owner.

A license to common carriers for public use, at a particular point, would not warrant the issuing of other licenses without regard to reason and the necessities of commerce.

MCENERY, J., concurs with Breaux, J.

ON APPLICATION FOR REHEARING.

WATKINS, J. The District Judge maintained a plea of no cause of action and dismissed the plaintiffs' suit, and they having appealed we reversed his decree—a majority of the justices entertaining the opinion that the petition disclosed a cause of action.

The result of our decision is that the cause will be reinstated and remanded for trial according to law; and in the lower court it will have the same *status* that it had before this appeal was taken—the plea of no cause of action being omitted.

We have decided no issue in the case. Those issues made, as well as those which may be hereafter raised therein, will be considered and determined by the District Judge; as they will be completely at large. But, while expressing this view, we do not abandon or intend to modify the views which the majority of the justices entertained, originally—i. e., that the plaintiffs' petition discloses a cause of action.

MR. JUSTICE BLANCHARD not having participated in the original opinions and decision of the cause, takes no part in this opinion, and MR. JUSTICE BREAUX adheres to his original views.

Jones vs. Freeman.

No. 12,806.

J. W. JONES VS. J. S. N. FREEMAN.

The plaintiff, contesting an election, relying on a paper purporting to be tally list of the votes, not attested by the commissioners appointed by the Board of Supervisors, and on ballots with the paper delivered to the clerk of the court by one of such commissioners and a person not shown to have had any official relation to the election, the plaintiff producing no supporting testimony that the paper and ballots exhibit the result of the election, has no cause of complaint, if, in that condition of the proof, the jury give controlling effect to the compilation of votes and proclamation by the Board of Supervisors also placed before the jury, announcing the election of defendant; under the law, that proclamation standing as evidence of defendant's election, unless overthrown by proof. Election act of 1894, No. 181, Secs. 36, 37, 40, 42.

A PPEAL from the Tenth Judicial District Court for the Parish of Natchitoches. *Hunter, J.*

Jack, Tucker & Fleming for Plaintiff, Appellant.

Pierson & Porter and *Scarborough & Carver* for Defendant, Appellee.

Argued and submitted February 16, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff appeals from the judgment dismissing his petition contesting the election of defendant as sheriff of the parish of Natchitoches.

The petition charges, in substance, that the Board of Supervisors excluded in their compilation of the votes cast at the election the vote cast at Ward 8 of the parish, and thus deprived petitioner of the count in his favor of a majority of one hundred and eighty-seven he claims to have received at that poll as a candidate for sheriff. At other polls he charges the receiving of illegal votes, the exclusion of legal votes and other wrongful acts on the part of the commissioners to his prejudice by which he claims he was deprived in the count of a number of votes cast in his favor, and he alleges that the votes cast for him, but not counted by the Board of Supervisors, were

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enough to overcome the majority of sixty-five in favor of the defendant, proclaimed as the result of the election by the Board of Supervisors. The answer of the defendant avers that though given a majority only of sixty-five by the compilation and proclaimed result, he was, in fact, entitled to more, and the answer details the illegal votes alleged to have been returned for the plaintiff by which defendant's majority was reduced. The answer charges that in Ward 3, alleged by plaintiff to have given him a majority of one hundred and eighty-seven, that riotous men took possession of the polls: by threats and intimidations compelled two of the appointed commissioners and the sheriff to leave; then appointed commissioners of their own, who received one hundred and ninety-two illegal votes cast for plaintiff. The answer further charges the attempt by violence to compel the Board of Supervisors to compile these illegal votes in plaintiff's favor and avers that the entire proceedings at that poll were illegal and no votes should be counted as cast at that poll except thirty-five, of which the defendant received twenty-two, cast while the election was conducted by the lawful commissioners and before the mob took control of the polls.

The plaintiff by motion and the plea in bar, as it is termed, sought to exclude from the defendant's answer, all defences, except those relating to the grounds of contest stated in the petition. There were other preliminary questions arising on the applications to count the votes before the trial; on rules to compel security for costs, and other questions which have been discussed in the brief. But in our view these questions require no consideration under the agreement of the parties as to the issue for decision.

The plaintiff excepted to the allowance of the jury, the plaintiff insisting that under the law the trial must be by the court without a jury. The Revised Statutes prescribed the jury trial and a majority verdict as the mode to determine contested election cases. Under the later act of 1877 and that of 1894, now in force, the method of trial is to be that for ordinary cases, save that election contests are to have a preference. As trial by jury is secured to all suitors who claim it, we find no basis to deny a jury in a contested election case. Act No. 24 of 1894, No. 24 of 1877. Code of Practice, Arts. 494, 495.

On the trial the plaintiff offered in evidence the compilation of the votes and the proclaimed result announcing defendant's election; there was the admission that the compilation embraced no votes at

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poll three; the clerk of the court testified that the box produced by him, accompanied with a paper purporting to be the tally lists of the votes at that poll, had been delivered to him one or two days after the election, the seal on the box when delivered unbroken, until on a previous occasion it was produced in court, and that this delivery was by D. W. Childers and B. F. Adams. On the cross-examination by defendant's counsel the witness stated the commissioners for that poll appointed by the Board of Supervisors were H. H. Oliver, D. Childers and W. M. Finley. The plaintiff offered successively the paper accompanying the box signed by H. T. Brown, D. W. Childers and B. F. Adams and the ballots contained in the box. To this defendant's counsel objected that the paper was not attested by the commissioners of election appointed by the board, that the ballots rested solely on that paper, and hence neither the paper or ballots could be admitted in evidence, the defendants supporting the objection by the affidavit of the two appointed commissioners of the violence at the poll, the control of the mob, and that no election had been held there. The objection overruled, the defendant reserved the bill. The minutes of evidence show that the affidavit was offered in evidence. In this condition of the proof the plaintiff closed his case, the minutes showing the case was rested on both sides on the record as made up by the stenographer's notes, "all other demands given up." The agreement thus restricted the issue to the alleged vote at poll three and the effect to be given the evidence before the jury.

The argument for plaintiff is, substantially, that the paper accompanying the box and the ballots in it showed the plaintiff's election. The election law provides that the duly appointed commissioners shall conduct the election, count the ballots, replace them in the box sealed, and deliver the tally lists, list of voters, compiled statements and ballot boxes to the Board of Supervisors. On the returns thus made the board is to compile the total vote at all the polls, proclaim the result, and on that proclamation the commission issues to the successful candidate thus announced. Act 181 of 1894, Secs. 36, 37, 40, 42. In this case the paper relied on by plaintiff is not attested by the commissioners appointed by the board, but is signed by one only and two persons not shown to have had any official relation to the election. It is urged on behalf of the plaintiff that the law authorizes one of the commissioners to act, and to appoint others. But

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one can appoint only, when the others appointed are not present. So if none of the commissioners appointed by the board are present, the voters can select. But in a contested election when one of the parties relies solely on alleged returns not signed by the commissioners, nor transmitted to the board, the burden is on him to show the condition which under the law call to the functions of returning officers, others than those appointed by the board. The presumption the law attaches to acts of public officers is invoked to sustain this paper. But, at least, before that presumption can exert any influence, it must appear that the appointing power of the single commissioner was exerted. There is no explanation in the testimony of the signatures of the strangers to the returns, nor allegations or proof that one paper was ever transmitted to the board. On the contrary it is shown the paper with the box came into the hands of the clerk from one only of the appointed commissioners and a stranger. The law, scrupulous to preserve the integrity of the ballots actually cast, guards against any substitutions by the requirement that the commissioners themselves, or, at least, two of them, shall carry the ballot boxes and returns, not to the clerk, but to the Board of Supervisors. Act No. 181 of 1894, Secs. 37, 47. In our opinion neither the paper or the ballots were put before the jury under the sanctions prescribed by law to make either evidence in the case. The defendant's answer, *i. e.*, that part referring to the beginning of the elections at poll 8, was formally offered in evidence by plaintiff. The averments in the answer on this point were, in effect, the opening of the election, the violence later, the control of the mob, the voting up to the time of that control giving defendant a majority and that 192 illegal votes for plaintiff were thereafter received by those who took charge of the poll and counted by them for plaintiff. The answer, in our view, did not improve plaintiff's case. Resting on the basis supposed to be afforded by the paper, the ballots, the testimony of the delivery of the box and paper, confronted by the compilation of the votes and the official announcement of the defendant's election, the plaintiff chose to rest his case. The jury were thus permitted to consider all the evidence produced by plaintiff, notwithstanding defendant's objection to the paper and ballots. Without any supporting testimony the jury might well refuse to be guided by a paper and alleged ballots, the paper attested by the commissioners ap-

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pointed by the board, nor accompanied with the poll list and with no explanation on that subject and with the proof that neither ballots or paper came through the channels provided by law or were laid before the board. In this condition of the record, in our opinion, the plaintiff has no cause for complaint of the controlling effect, the jury gave to the compilation and proclaimed result of defendant's election made by the officials charged with the duty of ascertaining and announcing the result, and which stands as the legal evidence of that result, until it is overthrown by proof.

We have given attention to the discussion in the brief, whether the jury should have considered the affidavit of the two commissioners detailing the occurrence at poll 3, and stating that the votes claimed by plaintiff at that poll were illegal. The affidavit is shown to have been offered in connection with defendant's objections to the testimony, and also to have been offered on the merits. On the rule for new trial, the contention was the paper should not have been considered by the jury. Its only function, it is claimed, was to support the objections to the testimony. The learned counsel for plaintiff evinces the sincerity of his appreciation that the affidavit should be restricted to the objections. On the other hand, the counsel for defendant certainly understood the paper was before the jury on the merits. In that faith, relying on the minutes, the defendant closed his case. The argument to the jury on both sides, we gather from the affidavits, was to some extent devoted to that paper. Under these circumstances, we do not feel at liberty to set aside a verdict upon the ground that notwithstanding the note of evidence the affidavit is not to be deemed offered in evidence, and on the assumption it exerted an improper influence on the jury.

The election law makes liberal provision to maintain the actual election by the votes cast. No election, it is declared and repeated, shall be vitiated by the omission of duties on the part of the commissioners or of any other instrumentality to conduct the election. While it gives *prima facie* effect to the proclaimed result, the party aggrieved by that proclamation is reserved the fullest opportunity to overthrow that announcement by proof that he received the majority of votes. The carefully framed petition of the plaintiff contained all the averments to give him the office, if sustained by the proof. It must be borne in mind that had he chosen to offer the testimony, the defendant would have had the right to offer opposing proof.

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The plaintiff conceived he could rest on the record as made up by the stenographer. The defendant was content to stand on it. The plaintiff complains of the requirement of security from him for costs, and from the argument we infer that requirement had some influence in inducing the agreement to submit. While it is to be regretted that any litigant should be embarrassed in asserting his right by inability to provide for costs, it must be apparent that circumstance can exert no influence on our decision.

The rule for the new trial was mainly devoted to the influence supposed to be exerted upon the jury by the affidavit, and, on that ground the application for another trial is earnestly insisted upon here. We have already expressed our views on that point, and our conclusion is the court did not err in refusing the new trial.

We have considered the case in all its aspects and find no basis on which we can disturb the verdict.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,278.

PONTCHARTRAIN RAILROAD CO. VS. THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT.

Property by reason of its situation away from the Mississippi river, owing no servitude for levees, must be paid for when expropriated for a levee in the rear of the city constructed by the Orleans Levee Board. Const., Art 156; C. C., Arts. 665 *et seq.*; 34 An. 494; 43 An. 275; 160 U. S. 468

Damage to the property of the owner, or loss in respect to the property incident to the expropriation, entitles him to compensation although there is no taking of the property.

The right to compensation for property taken for public use is not to be denied on the ground that the expropriation is the exercise of the police power.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Denègre, Blair & Denègre for Plaintiff, Appellee.

Bernard McCloskey for Defendant, Appellant.

Railroad Co. vs. Levee Commissioners.

Argued and submitted March 5, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

MILLER, J. This appeal is by the defendant from the judgment awarding plaintiff compensation for the damage to the railroad, caused by the construction by defendant of a levee across the defendant's road.

The defendant, created a corporation by legislative act to construct and maintain a levee system in the Orleans Levee District by levees on the river, canal, lake or elsewhere, about building a levee between the rear of the city and the lake, crossing plaintiff's railroad, was enjoined by plaintiff on the ground that the levee would cause plaintiff damage by necessitating the taking up, relaying the tracks and elevating the grade of the roadbed, for which damage the plaintiff claimed previous compensation. The answer was the general issue followed by trial and judgment for plaintiff, the subject of this appeal.

The injunction was directed against the digging of a canal, as well as the making of the levee, but the canal was abandoned, and by agreement the work of the levee was permitted to proceed, the court to award suitable compensation, if of the opinion any was demandable. The damage alleged arises from depositing the earth dug to make the levee upon the plaintiff's tracks, the construction of the levee on and across defendant's roadbed and the cost of elevating the grade and taking up and relaying defendant's tracks. No question is raised as to the amount of the damages awarded, but the contention is whether any compensation is due.

The argument for the defendant is that every proprietor must submit to the loss incident to the building on his land the levee requisite to guard against overflow of the river in the city front, or the lake in the rear. It is claimed that such a work authorized by law is the exercise of the police power, to which all must submit, and in respect to which no compensation for resulting loss can be claimed by the owner whose property is affected by the exertion of that power. But in opposition to this view is the well settled principle embodied in the Constitution that private property shall not be taken for public purposes without compensation to the owner. Civil

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Code, Art. 2621; Constitution, Art. 156. Where land is taken, or the use of it incommoded, or a burden is imposed on the owner to build a levee, or, to take another illustration, to open a street, the right of the owner to compensation is not to be denied, because of the supposed exercise of the police power, but the owner's claim for compensation falls within the operation of the principle that secures compensation when private property is taken for the public utility. The police power, hence, exerts no influence on the issue here. *Cooley Const. Limitations*, p. —; *Carrollton Railroad Co. vs. Avart*, 11 La. 192; *Municipality No. Two*, for opening Euphrosine St., 7 An. 72.

The defendant cites the line of authority that denies any compensation for property owners affected by the exercise of such functions of government as raising the grade of streets or bridging rivers, or exerting control over the channels of rivers. But in that class of cases there is no taking of property. Any injury that may arise to private property is consequential to the exertion of governmental functions, and entirely disconnected with expropriation for public purposes. The distinction between expropriation and consequential injuries arising from the exercise of the necessary functions of government, is stated in one of the cases cited by defendant. In the one case no compensation is due, for the reason, with others, there is no encroachment on private property; in the other, there is an expropriation, and hence the owner's right to compensation. *Transportation Company vs. Chicago*, 99 U. S. 642.

The front proprietor on the Mississippi river or other navigable rivers must yield without compensation the property for levee and road purposes. The servitude for levee and road purposes is imposed on him and he acquires his property subject to that servitude. *Civil Code*, Arts. 665 *et seq.*; *Bass vs. State*, 34 An. 494; *Ruch vs. City*, 43 An. 275; *Eldridge vs. Trezevant*, 160 U. S. 468. But the plaintiff's land not on the river owes no such servitude.

We do not understand it is controverted that a substantial injury to the property owner, in respect to his property or loss imposed on him incident to the expropriation, though there is no taking, entitles him to compensation, nor is there any issue, as we appreciate the argument, that the damages claimed are fairly within the scope of the article of the Constitution awarding compensation for private property taken for public use.

Bank vs. Weiss & Co.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

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No. 12,264.

OUACHITA NATIONAL BANK VS. JULIUS WEISS & CO.

The shipment to a factor unaccompanied with any instructions or agreement as to the application of proceeds, will subject the property to the factor's privilege for the debt due to him by the consignor, and this privilege takes effect under the statute from the time the bill of lading is delivered to the carrier, and under the Code when the property is received. Civil Code, Art. 3247; Act No. of 1852; Act No. of 1874.

This privilege can not be defeated by an order accompanied by the bill of lading given by the consignor after the privilege of the consignee has attached.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Harry H. Hall for Plaintiff, Appellee.

Farrar, Jonas & Kruttschnitt and *E. T. Lambkin*, for Defendants, Appellants.

Argued and submitted on briefs December 18, 1896.

Opinion handed down January 18, 1897.

Rehearing refused April 26, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff claims to have advanced J. W. Parks, a planter in the parish of Ouachita, to enable to make his crop of 1894; that one hundred and twenty-five bales of cotton, part of the crop, was shipped to defendants for the purpose of paying plaintiff, to whom the shipper transferred the bill of lading and gave an order on defendants for the cotton; on the refusal of defendants to deliver, the plaintiff sued for the cotton or its proceeds, to the extent of the amount advanced. The defendants' answer avers that they have the factor's lien on the cotton to pay one-half the indebtedness of the planting firm of which the shipper was a member; and the answer avers the tender to plaintiff of the surplus of the pro-

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ceeds after applying one-half of the proceeds to the privileged debt due defendants. From the judgment in plaintiff's favor, defendants appeal.

The firm of Lee & Parks were indebted to defendants for advances in the year 1894. J. W. Parks, the shipper of the one hundred and twenty-five bales, and a member of that firm, when the debt of his firm to defendants had reached a certain amount, obtained from defendants for his firm a further advance. He executed a paper stipulating that two hundred bales should be shipped defendants in addition to four hundred bales of cotton his firm had agreed to ship them. Lee & Parks did ship four hundred and ten bales, and Parks made two shipments of two hundred bales of his cotton, of which the one hundred and twenty-five bales form part. After crediting the proceeds of all the cotton shipped by Lee & Parks and half the proceeds of that shipped by Parks, there still remains a large debt due them by Lee & Parks.

The plaintiff, the Ouachita National Bank, in support of their claim to the proceeds of the one hundred and twenty-five bales, have proved the loan to Parks by the bank of three thousand dollars, and we think it was the understanding the bank was to be paid from Parks' crop of 1894. We do not understand the bank claims any lien arising from this loan. The one hundred and twenty-five bales were shipped to defendants with no instructions, under a bill of lading stating Parks was the shipper and exhibiting the shipping marks of his firm, L. & P. But after the shipment, the bank reminded him of his debt, and he then sent the triplicate bill of lading and the order on defendants for the delivery. The order is dated 13th March, 1895, more than thirty days after the cotton came into defendants' hands. The bank stands before us with such right as the order and accompanying bill of lading can give, and as we appreciate the argument it seeks to maintain, the cotton came into defendants' hands charged with the payment of the bank's debt. The bank produces the testimony of Parks that he owed the bank nothing individually, that the shipment was not to pay his firm debt, but to pay the bank, and he testifies the bank knew it. The bank also offered the testimony of Lee that at defendant's instance he solicited the shipment to them of Parks' cotton, to enable them to make commissions, and that at defendants' request he asked Parks after the shipment to consent to the application of his cotton to payment of his firm's debt, which he refused.

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The defendants to maintain their right to apply one-half the proceeds of the one hundred and twenty-five bales of cotton to pay the debt of Lee & Parks rely on the paper containing the recital of the loan of sixteen hundred dollars by defendants, in consideration of which there is the agreement to ship two hundred bales in addition, the paper states, to the four hundred bales agreed to be shipped by Lee and Parks. The paper begins: "We, the undersigned, J. W. Parks of Lee & Parks in consideration of, agree," etc. The testimony of Parks is, the words "of Lee & Parks" was not in it when executed. The testimony of defendants' witness is, he does not know whether or not the paper contained the words, and in answer to the suggestion that the paper bore the impress of being copied, the witness stated, if copied, the press copy would be furnished, but none was furnished. But it was not questioned the paper bears Parks' individual signature. In addition the defendants have produced the testimony of a witness that about the 11th of March, a short time after the shipment, Parks expressed his willingness that defendants should get the proceeds in controversy, and the testimony of another witness that in the negotiation between defendants and Parks, it was distinctly understood he was to ship the cotton "pledged," to use the expression of the witness, to pay the firm's indebtedness to defendants, and this witness also testifies that later, Parks promised the shipment followed by that of two hundred bales, including the one hundred and twenty-five bales in controversy.

The appropriation by the shipper of the property or its proceeds to pay the debt he indicates made known to the consignee, who assents to such appropriation expressly or by receiving the consignment under the instructions as to its disposition, precludes the consignee from asserting any claim to defeat the purpose of the consignment. The decision in 43 An., p. 1, Bank vs. Mayer & Co., cited by plaintiff, is a type of others affirming this species of dedication of property shipped. If the paper signed by Parks stipulating for the shipment of two hundred bales is to have the force claimed for it by defendants, and if the other testimony offered by them is to be accepted, they had the right to apply the cotton to pay their debt. Their entire conduct evinces insistence on that right. We have the statement from plaintiff's witness, Lee, the cotton was not shipped to pay the debt of Lee & Parks. It was Parks, not Lee, that made the shipment, and the witness' statement

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as to the purpose of the shipment seems to be his deduction. Parks' testimony that the shipment was to pay the bank's debt, and that defendants knew it, is not accompanied with any testimony how they knew it. It does not appear any communication was made to them before the shipment that it was for the bank. On the contrary, the shipment was made with no direction whatever accompanying the shipment. It was not until a month after the cotton was received and had become subject to plaintiff's privilege, if that privilege existed, that an order was presented to defendant to deliver the cotton. It seems to us, in the condition of this record, there is no basis on which we can hold this cotton came into defendants' hands under directions, express or implied, to appropriate the proceeds to the bank's debt. This case is in marked contrast in this respect with that cited by plaintiff. In that case, before the shipment the consignee was presented with the bills drawn against the shipment, received it with full knowledge of its dedication, and it was held he could not, after receiving the property under the mandate for its disposition, set up his factor's privilege to defeat the disposition proposed by the consignor, and in effect assented to by the consignee. Here the property comes into defendants' hands with no dedication whatever to interfere with the operation of the privilege of defendants, if the law gave any.

The plaintiff denies that defendants had any privilege. If that contention can be maintained the order of the shipper must prevail. The statutes and the Code gave the factor the privilege on the property consigned to him for the payment of the debt of the consignor; the statutes from the date the bill of lading is placed in the mail or in the hands of the carrier; the Code when the consignment is received. Acts 1874, 1882, Nos. —; Art. 3247, C. C. Giving due weight to the testimony of Lee that the cotton was not shipped to pay the debt to defendant, it remains he was not the shipper, nor does he testify to any communication to defendants of the purpose of the shipment, nor does he undertake to give testimony of the negotiation of Parks with defendants when he obtained the loan from the defendants for his firm and executed the paper for the shipment of two hundred bales, on which defendants rely. It is true Lee also testifies to the refusal of Parks to assent to the application of his cotton to pay the firm's debt. This was after the shipment. If defendants had the right to make that application his refusal of

Bank vs. Weiss & Co.

consent did not diminish that right. The statement from Parks that defendants knew the shipment was for the bank's debt must be taken in connection with the fact that neither he nor the bank or any other person ever made such communication to the defendants, and the additional fact that no instructions accompanied the shipment. On the other hand there is evidence carrying, we think, great persuasive force that the shipment was designed, when it was made, to pay the indebtedness to Lee & Parks. The paper executed when the sixteen hundred dollar loan was obtained, if read without the words claimed to have been added, still must be deemed significant on this branch of the controversy. The loan of sixteen hundred dollars to the firm, in consideration of which the obligation expressed to ship two hundred bales of cotton, carries the inference the firm's indebtedness was to be repaid from the cotton. If it was Parks' cotton we can not suppose defendants would advance only to get commissions, the sole reason, according to defendants' witnesses, for Parks' shipments to defendants. No explanation comes from Parks or from any witness who was to send forward the two hundred additional bales, if he was not to be shipper. He did ship that precise number, of which the one hundred and twenty-five in controversy are part; the marks on the cotton are L. & P., and there are no instructions of any purpose other than that defendants would naturally draw from their negotiation with him. We have, then, this paper stipulating the loan; the obligation to ship two hundred bales, and read with or without the words "Lee & Parks," indisputably signed by Parks individually, is followed by his shipment of his individual cotton, making up the six hundred bales the paper stipulated were to be shipped. It is extremely difficult to resist the conclusion on this phase of the record that the shipment was to pay the debt of Parks, made up in part of the sixteen-hundred-dollar loan he had obtained for his firm on the faith of the promised shipment recited in the paper signed by him. We have, too, placed before us the testimony of Parks' expressed willingness the defendants should have the proceeds, and the testimony of another of defendants' clerk or agent who, we infer, conducted the negotiation with Parks, and that witness testifies positively it was distinctly understood with Parks that he was to ship his cotton to pay the indebtedness to which defendants have applied the proceeds. We think the conclusions upon the testimony is his shipment

State ex rel. Romain vs. Board of Supervisors.

fulfilled that understanding; that the cotton shipped to pay the defendants' debt was subject to their privilege the moment it reached their hands, and that privilege could not be defeated by Parks' order given a month later.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed that the defendants be decreed to have a privilege as factors on the one hundred and twenty-five bales of cotton, or the proceeds, to pay one-half the indebtedness of Lee & Parks (\$2914.68), two thousand nine hundred and fourteen dollars and sixty-three cents, the surplus of the proceeds to be paid to plaintiff, and the prayer for damages by the defendants be rejected and that plaintiff pay costs.

No. 12,319.

STATE EX REL. ARMAND ROMAIN VS. BOARD OF SUPERVISORS OF
ELECTION.

The judiciary is silent until the presentation of some real right in conflict opens its lips.

Therefore, where a candidate for office applies for a *mandamus* to compel the appointment of commissioners of election in his behalf, and the application is dismissed and an appeal taken to the Supreme Court, and if, when the case is submitted, the election has been held, the appeal will be dismissed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

W. S. Benedict for Plaintiff and other Appellants.

M. J. Cunningham, Attorney General, *E. B. Kruttschnitt* and *F. C. Zacharie* for Intervenors, the Democratic Party, Appellees.

Argued and submitted February 20, 1897.

Opinion handed down March 1, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

MCENERY, J. The relator was a candidate for Congress. He was

49	578
52	4
49	578
111	1017
49	578
120	161
49	578
124	79

nominated by a nominating body of one hundred. He applied for representation at the polls in the distribution of commissioners allowed by the present election law. His claims to representation were resisted by what is called the Regular Republican organization and the Democratic party.

The nominating body of one hundred and the organization called the National Republican party joined in his application. The election officers decided that representation should be accorded to the two prominent political organizations, the Republican and Democratic parties.

The relator applied for a *mandamus* to the District Court to enforce his rights of representation.

On the plea of no cause of action the suit was dismissed. He has appealed to this court. All this was in November, 1896, preceding the election. The election has been held and the right of relator to his office has been transferred to one of the political bodies of the Federal government.

The question presented is purely an abstract one, which involves no right between the contending litigants. For this reason a motion has been filed to dismiss the appeal.

The motion must prevail.

The province of the judiciary is to interpret the law in every controversy of right which is brought before it. Its decree is final only in the case in controversy, and is applicable to all corresponding cases as a precedent.

It is incapable of determining feigned issues. In the instant case to construe the election law, where there is no right in the controversy, in which the opinion rendered could affect no one or be the basis of any effective decree, would be to render the court only a moot court for the examination and trial of political theories.

The reference of such cases to it is inconsistent with the institution of law. The fact that its acts are limited to the determination of controverted rights is evidence that to entertain feigned issues is beyond its power.

Vast changes and crises may follow in swift succession. Political order may be subverted, yet there may be no case involving in a special controversy the rights of contending litigants.

The judiciary is silent until the presentation of some real right in conflict opens its lips.

The appeal is dismissed.

 Melbaum vs. Brennan.

No. 12,418.

MRS. MARY E. MEIBAUM VS. JAMES A. BRENNAN.

1. Title, springing from acts of sale sufficient in form to transfer immovable property, acquired in good faith, accompanied by possession as owner, suffices for the prescription of ten years.
2. Such title held sufficient, and defendant, who had agreed to purchase, but who refused to receive the property on the ground that title was not good, compelled to accept it.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Henry P. Dart and Benj. W. Kernan for Plaintiff, Appellee.

Frank Zengel for Defendant, Appellant.

Submitted on briefs March 31, 1897.

Opinion handed down April 12, 1897.

The opinion of the court was delivered by

BLANCHARD, J. This is a suit to compel the defendant to complete and carry into effect an agreement to purchase certain immovable property by accepting the property and taking title thereto.

The property in question is a certain piece of ground with improvements, situated on the corner of Annunciation and Toledano streets, New Orleans, and is subdivided into three lots.

The defendant agreed to take the property and pay two thousand one hundred and fifteen dollars therefor.

The allegation is made that a good and legal title was tendered him, and that without just cause he refused to accept the same.

Defendant admits the agreement to purchase at the price stated, but claims the title tendered is not good for the reason that Jean M. Begue, a remote author of plaintiff's title, acquired the property at sheriff's sale for taxes in 1874, at the suit of the State of Louisiana vs. James Crocker, in the Superior District Court. He avers that the record of this suit is lost, and that no registry of any deed or act of conveyance of the property to Crocker can be found in the conveyance office, and there is no evidence that Crocker was the owner of the property at the time of the tax sale.

The judgment of the court below was favorable to plaintiff and defendant appeals.

Nothing appears in the record to connect James Crocker with the proprietorship of this property save the appearance of his name on the tax assessment rolls for several years as owner thereof, the suit of the State against him for taxes, and the sale of the property under the judgment rendered therein.

Nothing is known of Crocker, nor of any heir, or vendee of his. No adverse claimant appears on that behalf, though more than twenty-three years have elapsed since the property was sold at tax sale as belonging to Crocker.

Though the record itself, of the suit of the State against Crocker, is lost, the deed to the property, executed by the sheriff to Begue as the purchaser at the tax sale, was duly recorded at the time in the conveyance office.

Begue went into possession as owner after his purchase, and this possession continued down to his death. He died and his succession was duly opened. By virtue of a judgment of the Probate Court rendered therein, Mrs. Rosina Begue was recognized as the widow in community and universal legatee of the said Begue, deceased. This was in 1878. The judgment recognizing her as widow and legatee was duly registered in the conveyance office, as a muniment of title.

In 1881, Mrs. Rosina Begue, who had meanwhile become the wife of John S. Schellang, sold the property, with consent of her husband, to Frederick Apken for eight hundred and fifty dollars, with warranty of title.

Apken sold it in 1887 to Charles L. Schoff for thirteen hundred dollars, with warranty of title.

Schoff sold it in 1892 to the plaintiff for thirteen hundred and thirty-four dollars and thirty cents, without warranty of title.

These several acts of sale were duly registered in the conveyance office.

The possession of the property by these several vendees, as owners, was peaceable, public and uninterrupted.

On this showing we agree with the judge *a quo* that defendant ought to take the title.

As to the tax title acquired by Begue in 1874, the record of which suit was lost, after this lapse of time the maxim *omnia præsumuntur recte et solemnitate acta esse*, may be invoked.

Weil vs. Schwartz.

The several acts of sale, beginning in 1881, to Apken, Schoff and the plaintiff, are sufficient in form to transfer immovable property.

Such title acquired in good faith, accompanied by possession as owner, suffices for the prescription of ten years. C. C. 3478, 3484-5-6-7; Beer vs. Leonard, 40 An. 845; Wells vs. Wells, 80 An. 985; Pattison vs. Maloney, 38 An. 885; Barron vs. Wilson, 38 An. 209.

There is no suggestion that Crocker left heirs, who may have been minors long enough to suspend the current of prescription. And if there be such, we agree with the trial judge that the assessment in Crocker's name and the sale for his taxes, would silence any claim urged in behalf of such possible heirs.

Judgment affirmed.

NICHOLLS, C. J., not having heard the argument takes no part in this opinion.

No. 12,430.

MARK WEIL VS. MOSES SCHWARTZ.

The remedy through the medium of the *folle enchere* has been properly characterized as summary and severe, and consequently it ought to be confined to cases clearly coming within the provisions of the law.

It is not applicable to sheriff's sales made under writs of *ieri facias*.

An order of court dissolving an injunction on bond is of that class contemplated by C. P. 566, which may cause the plaintiff an irreparable injury, in case it would operate a change of the possession of immovable property, or alter the status of the property so as to defeat any substantial object to be attained thereby.

Breaux, J., concurring: The injunction having been bonded, on appeal from the interlocutory order permitting the seizing creditor to bond, which the appellant and plaintiff in injunction pleads may cause him irreparable injury, he, appellant, may justly ask a hearing in support of his injunction.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

E. Evariste Moise for Plaintiff, Appellee.

Dinkelspiel & Hart for Civil Sheriff, Defendant, Appellee.

Lazarus, Moore & Luce for E. V. Benjamin, Intervenor, Appellant.

49	582
110	741
49	582
e113	562
49	582
119	320
49	582
121	227

Weil vs. Schwartz.

Argued and submitted March 19, 1897.

Opinion handed down March 29, 1897.

Rehearing refused April 26, 1897.

The opinion of the court was delivered by

WATKINS, J. As this is an appeal from an interlocutory order dissolving an injunction on bond, the merits and motion to dismiss may be taken together.

The grounds of the motion are, (1) that plaintiff in injunction has no right of appeal; (2) the bonding order is interlocutory; (3) it causes no irreparable injury, the demand being compensable in money.

From the petition of E. V. Benjamin we ascertain that in certain interlocutory proceedings, entitled as this suit is, certain lots of ground situated in the city of New Orleans were adjudicated to him at public auction, as the last and highest bidder; and that subsequent to said adjudication he expressed himself as willing to comply with his bid on being tendered a good and valid title.

That the seizing creditor and his counsel insisted upon his complying with his bid, and upon his failing to do so they proceeded to at once readvertise the property at his risk and expense.

That, in communicating with the seizing creditor and his counsel, he attracted attention to the fact that there were several defects in the title of the seized debtor, and advised them that said defects were, in his opinion, so serious that he would not accept the adjudication of same except upon a decree of court declaring the validity of said title; but that the seizing creditor and his attorneys "refused to take a rule to have said title passed upon, and proceeded to have said property resold at the risk and expense of petitioner.

"That said property has been readvertised for sale * * * *a la folle enchere*, without any rule having been taken and without any order of court; and that it is doubtful and questionable whether the seizing creditor and the civil sheriff can proceed to sell *a la folle enchere* without any order of court passing upon the matter and upon their right to do so."

After setting forth in full the grounds of his objection to the title tendered, the petitioner prays, that the seizing creditor be enjoined and restrained from further proceeding "with the said sale *a la*

folle enchere " and that he have and recover judgment decreeing him to tender, and to deliver to him a good and valid title to the aforesaid property on his complying with his aforesaid bid and paying the purchase price; and that in default of his so doing, that he have judgment canceling said adjudication and relieving him from any and all obligations thereunder.

The seizing creditor obtained an order for the suspension of the plaintiff's injunction against the proposed sale *a la folle enchere*, upon bond, in the penal sum of three thousand dollars; and from that order the latter sought and obtained a suspensive appeal.

The questions to be here considered are:

1. Whether this is such an interlocutory order as will authorize an appeal.

2. Whether this is an injunction which can be dissolved by giving bond, even if the application for the bonding was taken and tried contradictorily with the parties; and

3. Whether the application to bond, being *ex parte*, is not illegal, and should, therefore, be vacated and set aside on appeal.

Counsel have *ex industria* argued many questions which would have applicability were the case here upon its merits, but which are altogether irrelevant to this appeal.

The simple question for consideration is whether the bonding order is such an interlocutory judgment as *may cause* the plaintiff in injunction an irreparable injury, in the sense of Code of Practice, Art. 566.

It has been frequently decided that an order dissolving an injunction on bond would cause such irreparable injury, within the contemplation of the article, in case it would operate a change of possession of immovable property. *Torre vs. Falgoust*, 38 An. 560; *Railroad Company vs. New Orleans*, 30 An. 970; *Boedecker vs. East*, 24 An. 154; *Marion vs. Johnson*, 22 An. 512; *White vs. Caze-nave*, 14 An. 57; *Villavaso vs. Barthet*, 38 An. 417; *Delacroix vs. Villere*, 11 An. 39; *Bethancourt vs. Stephens*, 19 An. 291; *Brown vs. Brown*, 30 An. 507.

It has been just as frequently held that no appeal lies from an order of dissolution where the apprehended injury is compensable in money. *Anderson vs. Smith*, 28 An. 649; *Stetson vs. City*, 12 R. 489; *Brott vs. Eager & Co.*, 28 An. 262; *Cobb vs. Parham*, 4 An. 147; *Live Stock, etc., Co. vs. City*, 32 An. 1192; *Osgood vs. Black*, 38 An. 498.

Under these two rules decisions, practically innumerable, as many various tests have been applied, and it would not prove beneficial to the litigant or instructive to the profession, to pause here and attempt their alignment in respect to the present litigation. Suffice it to say that a bond of three thousand dollars could not possibly compensate an adjudicatee whose bid at the sheriff's sale was six thousand dollars, and on account of whose failure to pay over the purchase price a sale *a la folle enchere* is proposed by the seizing creditor; for *non constat* that the property will sell at the second offering for the difference of three thousand dollars. But let that be conceded for the argument, and yet the position of the parties is not altered, because the plaintiff in injunction affirms his right to the property, if the title be cleared of legal impediments, and he absolutely denies the right of the seizing creditor to proceed *a la folle enchere*.

To protect himself in the premises he was bound to enjoin; and our conclusion is that, if the seizing creditor had not the right to proceed to sell *a la folle enchere*, the bonding order was in violation of the rights of the plaintiff in injunction and operated to his irreparable injury, and as such the latter was entitled to an appeal.

The right to sell property *a la folle enchere* is founded on the precept of our Code which declares that "in all cases of sale by auction * * * if the person to whom adjudication is made does not pay the price at the time required * * * the seller at the end of ten days, and after the customary notices, may again expose to public auction the thing sold, as if the first adjudication had never been made; and if at the second crying the thing is adjudged at a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains the debtor to the vendor for the deficiency, and for all the expenses incurred subsequent

The plaintiff raised an issue of fact upon this point and insists that to the first sale." R. C. C. 2611.

In an early case our predecessors examined the question now under consideration and held, that the seizing creditor had not the right to proceed *a la folle enchere* in the event a bidder at a sheriff's sale should fail to comply with the adjudication and pay the purchase price.

Upon this question the court said:

"After a most deliberate examination of the question, we are of

Weill vs. Schwartz.

opinion that the doctrine *a la folle enchere* is not applicable to those sales made by a sheriff under writs issuing on final judgments. Art. 2595 of the Code declares that judicial sales are subject to the same rules as other public sales, in all such things as are not contrary to the formalities expressly prescribed for such sales, and with the modifications made thereafter. When we turn to Art. 2589 of the Code and observe the formalities required for selling property at the risk of the first bidder, we find them altogether different from the directions given to the sheriff by Art. 689 of the Code of Practice. Under the former article, if the price be not paid, no steps can be taken until after the expiration of ten days, to have a second sale, and then the customary advertisements must be published; but, under the latter, no such delays or formalities are necessary; the sheriff may, if the price be not paid, when the sale is for cash, or if the proper securities are not given when it is on a credit, proceed anew to sell the property and adjudge it to another person. The decisions of this court have been entirely adverse to the idea that the sheriff has to wait ten days and then sell after the customary notices." *Gallier vs. Garcia*, 2 Rob. 819.

The same principle has been frequently since maintained; for instance, in *Nolte vs. Creditors*, 3 La. 268; *Durnford vs. Degruys*, 8 M. 220; *Walker vs. Allen*, 19 La. 311; *McCargo vs. Insurance Co.*, 10 R. 307; *Amory vs. Black*, 13 La. 268; *Duncan vs. Armant*, 3 An. 84; *City vs. Pellerin*, 12 An. 92; and *Insurance Company vs. Rud-dock*, 22 An. 46.

This jurisprudence is principally grounded upon the difference between the provisions of Revised Civil Code, 2611, which treats of "all cases of sale by auction," and that of Code of Practice, 689, which treats of sheriff's sales, exclusively—the latter contemplating no delay whatever in making the second advertisement, while the former provides that the seller may proceed at the end of ten days to expose the thing first adjudicated for a second sale.

In *Guillotte vs. Jennings*, 4 An. 242, it was said that "the remedy through the medium of the *folle enchere* has been properly characterized as summary and severe, and from this consideration the conclusion is fairly derived, that it ought to be confined to cases clearly coming within the provisions of the law, and in which its requisitions have been observed. See *Second Municipality vs. Hennen*, 14 La. 586.

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“Article 2859, C. C., seems to us to contemplate that the terms of the *folle enchere* shall be the same as the first adjudication,” etc.

In *Jennings vs. Hodges*, 16 An. 321, the court held that “the remedy by a sale *a la folle enchere* is a harsh one, which must, in all cases, be strictly preceded by an observance of all the forms of law known in commutative obligations,” etc.

Applying the principles of the foregoing adjudications to the instant case, we think the order dissolving the plaintiff's injunction on bond was improvidently made, and, manifestly, operates to his prejudice and injury.

Whatever rights the plaintiff acquired as an adjudicatee of the real property adjudicated at the sheriff's sale are made the foundation of this injunction suit, and should be maintained *in statu quo* until the same have been judicially determined—it matters not what the result may be.

If the bond furnished by the seizing creditor is held to respond to all of his demands in the injunction suit, should it prove successful, it is quite evident it would stop short of the principal relief which is demanded by him therein.

We think the proper course was for the judge *a quo* to have declined to grant the order of dissolution on bond, and allowed the injunction suit to take its regular course in his court.

Entertaining this view, we are of opinion that the interlocutory order appealed from should be set aside and plaintiff's injunction reinstated.

It is therefore ordered and decreed that the interlocutory judgment dissolving the plaintiff's injunction on bond be and the same is hereby annulled and reversed; and it is further ordered that this appeal be maintained and plaintiff's injunction reinstated for trial according to law; and that the seizing creditor and appellant be taxed with the cost of appeal, all other costs to await final judgment in the District Court.

CONCURRING OPINION.

BREAUX, J. The seizing creditor assumed that the adjudication was legal and that the title was one the adjudicatee should accept.

The adjudicatee denied that the title was one he should accept.

There are several grounds alleged in the petition for an injunction to which he alleged he had called plaintiff's attention.

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He alleged that despite the grounds to which he had called appellee's attention after the adjudication, the plaintiff readvertised the property for sale at his (defendant's) risk and expense.

He sued out the injunction to prevent the plaintiff from selling the property at his risk and expense.

The injunction having been bonded on appeal from the interlocutory order permitting the seizing creditor to bond, which the appellant pleads may cause him an irreparable injury, he (the appellant) may, I believe, justly ask a hearing in support of his injunction.

The writ of injunction may have issued without grounds sufficient to maintain the petition and order of injunction.

But the court having granted the order of injunction and the petitioner for the injunction having complied with the order by filing a sufficient bond to respond for all damages he should now be heard.

While the adjudicatee most assuredly has no right unnecessarily to obstruct the execution of a judgment or the enforcement of an order of seizure and sale, he should have latitude enough at this period in the history of the litigation to sustain, if he possibly can, the plea of nullity which he has filed.

No objection to form; that is, to sell *a la folle enchere* is before us, as I appreciate the issues. Such a contention is, in my judgment, *ultra petitem* and at variance with the grounds heretofore urged by the plaintiff and the defendant.

Granted, however, in so far as the question is one of form that the sheriff is authorized to offer seized property for sale *a la folle enchere*, in my opinion this appellant, none the less, having furnished the required bond, should have a standing in court, to be heard before a re-offer of the property.

The appellee is amply protected by the bond.

For these reasons I concur in the decree.

NICHOLLS, C. J. and MILLER, J. dissent.

No. 12,270.

LOUIS A. SIBLEY VS. NEW ORLEANS CITY & LAKE RAILROAD COMPANY AND LOUISIANA ELECTRIC LIGHT COMPANY, IN SOLIDO.

Riding outside of the car on a running step is unusual and dangerous.

There were others on the step, near the plaintiff; they all passed a pole equally as near as the one by which a moment after the plaintiff was knocked off and severely injured.

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Taking under consideration the width of the step and the distance from the step to the pole, the rock and sway of the car in motion does not account for the contact of the plaintiff with the pole.

The plaintiff must have leaned back into the darkness (either to jump off, or for some other cause) to an extent that his head came in contact with the pole.

If one's negligence proximately contributed to the injury, so that without his concurring fault it would not have happened, he can not recover for the injury.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Benjamin Rice Forman and B. R. Forman, Jr., for Plaintiff,
Appellant.

Hugh L. Bayne and Denègre, Blair & Denègre for Defendants,
Appellees.

Argued and submitted February 3, 1897.

Opinion handed down February 15, 1897.

Rehearing refused April 26, 1897.

The opinion of the court was delivered by

BREAUX, J. Plaintiff brought this action against the defendant for the sum of fifty thousand dollars.

On the 14th of July, 1895, at about 12 o'clock at night, plaintiff was a passenger on the inbound West End train of the defendant railroad company. The car was a summer car. At the corner of Canal and Tonti streets he was knocked off this car by an electric light pole of the defendant light company. He was at the time riding upon the running steps of the car that runs along the side from front to rear. He was standing on the up-town side of the car. The car was on the right-hand track. He had paid his fare, which was collected by the conductor while he was riding on the step in the position in which he was when he got hurt.

He says that the conductor gave him no warning at the time and made no objection to his riding on the running steps; that he was riding on the steps because the car was crowded. He avers there was no standing room in the car; that when he was struck he was standing with his right hand on the railing of the dash-board and his left hand on the upright brass rod of the stanchion of the side of the

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car; that he was looking toward the inside of the car; that it was usual to ride upon the steps of the summer cars when the cars are crowded, and that no warning of any sort had been given to him.

The distance of the pole that struck the plaintiff from the track was two feet eight inches. The width of the step of the summer car was one foot six inches. The pole that struck the plaintiff was nearer the track than any other save one, which stood at an equal distance from the track.

The witness for plaintiff, who made the measurement, testified that the extension of the car itself (the body of the car), beyond the rail was one foot and one inch, and that the distance between the outside rail to the nearest side of the pole was, at the locality, as before stated, two feet eight inches. On the other hand, the assistant superintendent of the defendant railroad company testified that the distance was twenty-six inches from the post at the locality of the accident to the side of the car, by his measurement, and that it was fifteen inches from the outer edge of the step running along the side of the car, leaving eleven inches for the width of the step, and fifteen inches from the edge of the steps to the pole. Something was said by one of plaintiff's witnesses about the lateral motion of the car. The extent of the spring or play of the motion was not known.

The other poles than those before mentioned of the Light Company were from the track a distance of three, four and five feet respectively.

The plaintiff was greatly and permanently injured.

To clear the grounds at the commencement of the discussion, we sought to settle the question of distance between the track, the car, the running steps and the alleged offending electric light pole.

There is variance in the testimony upon this point. It remains that in the brief and at the bar, plaintiff's position is, on this point, as follows, viz.: the width of the step of the summer car was one foot six inches and the distance from the step to the pole fourteen inches. If we take into consideration the fact that the unfortunate young man was struck on the temple near the ear, the distance of which the defendants contend, is correct, viz.: fifteen inches from the step to the pole.

The theory of the court *a qua* and of the defendant was that, as the plaintiff approached Tonti street in this city, either for the purpose of jumping off or ascertaining the distance of the train from Galvez

street, where he expected to get off, or from some other cause, he leaned back and protruded his body and head from the car into the darkness to such an extent that his head came in contact with the pole and he was knocked off.

The plaintiff raised an issue of fact upon this point and insists that the evidence is to the contrary; that he did not lean back to see how far he was from his street, and did not in the least change his position. His statement is that the distance from the post to the step was fourteen inches; that the cars rock and sway from side to side when moving rapidly; that the whole of the distance, (it is contended, in behalf of the plaintiff,) is accounted for in this wise. The length of his arms, counsel estimates, was fourteen inches; holding the stanchion as he was doing when he was hurt, his head reached the post, although his elbows remained unmoved to the sides without extending them in the least.

We have found it impossible, after a careful examination into the facts, to agree with counsel. The rock and sway of a car in motion are not proven in this case, we have already stated. In the case to which our attention was directed from the evidence it appeared that when in motion the wheels of each car have a lateral play on the rails of one and one-half inches. *Summers vs. Crescent City Railroad Co.*, 34 An. 139-147.

One standing upright on the running steps of a summer car one foot and six inches in width, would not be exposed to a blow against a pole at the distance this pole was from these steps, because of the lateral motion of the car. His body despite this motion would remain within an entirely safe distance from the pole. Granted that it accounts for a limited distance of the intervening space, there remains at least one foot.

A passenger in a car who would needlessly protrude his head out of the window a distance of one foot, and receive a blow from a pole at that distance, which he had seen erected, as was the case with the plaintiff, and along a route familiar to him as the defendant railroad line is familiar to the plaintiff (having gone over it many times since a number of years, would not be entitled to damages).

In our view the one who chooses to ride on the running step has no greater right and is subject to the same rule. Ordinary prudence would suggest not to project one's body into the darkness a distance of one foot outside of the running steps on a car in motion.

The plaintiff, testifying, said:

"Q. You have ridden on these cars for the last six or seven years?

"A. I have.

"Q. And you knew these poles were alongside the track?

"A. There are posts in the middle of the track.

"Q. Then you know that?

"A. Yes, sir.

"Q. You saw that every day when you went out, then, didn't you?

"A. Yes, sir.

* * * * *

"A. I wouldn't lean out of any car.

"Q. Then you think it would be dangerous for any man to do that?

"A. Yes, sir; to any man it would be imprudent."

"It is well settled that a passenger who voluntarily and unnecessarily places himself in a position of danger can not hold the railway responsible for injuries of which his position is the efficient cause." Peterson's Railway Accident Law, 282, 283.

We think the conclusion is inevitable, with the facts before us, that the defendant projected his head and thereby met with the sad accident of which he complains. There were other passengers on the running steps at the time; six in number; they passed other poles, and equally as near as the one which struck the plaintiff. Not one of these passengers was injured. It is evident had the plaintiff stood erect without leaning backward that he also would have passed without injury.

The plaintiff seeks to support the position that he was ordinarily prudent in riding upon the steps by quoting from Beach on Contributory Negligence, par. 149:

"It is not negligence *per se* for a passenger to ride upon the platform or steps of a railway car."

In the section from which the quotation is made, the text writer says: "But if there is standing room within the car it is negligent to occupy the platform."

It appears that the cars were crowded and that there were no vacant seats. It was not made evident, by preponderance of proof, that there was no standing room. In *Chicago Railroad Company vs. Railroad Company*, 6 Brad. (Ill.) 201, it was held: "So long as there is standing room in the cars he must ride there."

There is authority in support of the position, that upon this point

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the burden of proof was with the plaintiff. "He must prove that he was there from necessity and not from choice." *Camden vs. Railroad*, 44 *American Reports*, p. 123.

To meet the weight of these authorities the plaintiff urged that he had paid his fare to the conductor while he was riding on the steps and that from him he received no warning. We are not led to infer from the testimony that the defendant railroad company gave its sanction to riding on the steps of its cars. On the contrary, there is evidence of record that it was against the express rule of the company.

Upon this subject, Mr. Beach very properly says: "How can an employee authorize a passenger to violate, not only the express rule of the company, but also the rules that every prudent man establishes for himself for his own protection." Par. 152.

In any case it does not relieve the passenger of the duty of care.

The District Judge, who saw and heard the witnesses, was satisfied from the evidence that plaintiff could have safely ridden upon the steps, if he had used ordinary care; that he did use ordinary care from the lake to Tonti street, and was not injured, although he passed the electric light poles situated in the two blocks just before reaching Tonti street (one of these poles was equally as near as the alleged offending pole and the other within a small fraction as near).

Having exposed himself as he did, the plaintiff is without right to recover damages from either of the defendant companies.

The judgment is affirmed.

No. 12,453.

STATE OF LOUISIANA VS. PETER PRECOVARA.

The offence was prescriptible.

An indictment which has been declared a nullity does not interrupt prescription. A year had elapsed from the date of the alleged crime to the day the information was filed.

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APPPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *James Simon*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellant.

Monroe vs. Lumber Co. et als.

A. & C. Fontelieu for Defendant, Appellee.

Submitted on briefs March 20, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by
BREAUX, J. An information for a prescriptible offence was filed. A plea of prescription was interposed as a bar to the prosecution. On the trial of this plea it was proved that an indictment had been found, which, upon a motion made by the defendant to quash, was quashed by the court.

Whereupon the District Attorney filed an information.

The judgment of the District Court sustained the plea of prescription.

From the judgment the District Attorney has taken this appeal.

The defendant could not be legally convicted. The information did not negative prescription. The defendant had not failed to sustain his plea. The indictment was, upon this plea, decreed null.

The indictment which had been declared null did not interrupt prescription. No appeal was taken from the court's order annulling it; it was as if it had not been found against the defendant.

This court has decided in a number of cases that a prior prosecution upon a fatally defective indictment does not interrupt prescription, *State vs. Morrison*, 31 An. 211; *State vs. Baker*, 30 An. 1134; *State vs. Curtis*, 30 An. 1166.

The year having elapsed from the date, it was alleged in the information that the crime had been committed, to the date the information was filed, our only alternative is to affirm the judgment of the District Court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court is affirmed.

No. 12,417.

MARION B. MONROE VS. H. WESTON LUMBER COMPANY, J. J. CLARK,
J. A. BLAFFER & SON, AND FERDINAND HINDERER, IN SOLIDO.

A petition which recites and avers that, in certain proceedings, pleadings and printed briefs, in a certain suit depending in a court of justice, which the parties thereto caused and directed their attorney at law to prepare and file, are certain libelous and slanderous statements, discloses a cause of action.

APPPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

A. B. Philips and Albert Voorhies for Plaintiff, Appellant.

Edwin T. Merrick and J. J. McLoughlin for Defendants, Appellees.

Argued and submitted March 17, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

WATKINS, J. This is an action for ten thousand dollars for slander and libel brought against the H. Weston Lumber Company, a private corporation, and several individuals *in solido*. The claim is founded upon the charge that said defendants conspired and confederated together in the matter of the suit of Marion B. Monroe vs. His Creditors, No. 42,011, on the Civil District Court docket, to prosecute the petitioner on a charge of fraud in order to defeat his discharge; and that, among other things, they falsely charged him with fraud in concealing his commercial books and knowingly omitting property from his schedule.

The plaintiff avers "that said proceedings were malicious and without probable cause, and that same were aggressively and maliciously prosecuted from the date of their filing, April 10, 1894, up to the final decision of the Supreme Court on the 28d of March, 1896, in favor of your petitioner."

And he further alleges that, in the course of said proceedings, said parties maliciously slandered and libeled petitioner by verbal and *written accusations* of fraud as aforesaid in the course of the proceedings in the District Court, and more especially in the Supreme Court *in their brief filed* February 11, 1896, and in the oral argument of their counsel *acting under their instructions*, and falsely charging petitioner with the fraudulent purpose of having materials furnished him and of swindling his creditors out of their honest debts."

And further, that they maliciously slandered and libeled him by "falsely charging and publishing him with being 'certainly a rogue,'

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and a 'perjurer besides.' That these charges and accusations were and are false, and were published by the defendants maliciously, they well knowing at the time that there was no truth in them."

Amongst other exceptions filed by the different defendants was that of no cause of action; and it having been maintained by the judge *a quo* and the suit dismissed, the plaintiff has appealed.

The exception is grounded upon the following provision of our statutes, namely:

"No client or person shall be held liable or responsible for any slanderous or libelous words uttered by his attorney at law; but attorneys shall be themselves liable and responsible for any *slanderous or libelous words uttered by them.*" Rev. Stats., Sec. 123. (Our italics.)

And in his reasons for judgment the judge *a quo* mainly rested his decision on that statute and the decision of the court in *Stockpole vs. Hennen*, 6 N. S. 481; the latter preceding the statute in point of time.

The judge regarded that decision as being reflected in the subsequent act of the Legislature and consequently he thought it of more than usual importance and as possessing special significance.

The case was one brought against the defendant as a practising lawyer who, as counsel in a pending suit, had charged the plaintiff, who was examined as a *witness*, with being guilty of perjury, and of having come to court with the intention of perjuring himself; and the petition alleged that the words spoken were falsely and maliciously employed, and with the intention of injuring the plaintiff.

In that case the court said: "The best rule is, we think, to protect counsel for everything they say which is pertinent to the case, if they are instructed by their client to say it; and to hold them responsible for everything that is impertinent to the case whether they are instructed or not."

But, in our conception, neither that decision nor the statute cited are applicable to the present case. The false, slanderous and libelous charges of which the plaintiff complains are those contained in the pleadings, proceedings, and printed briefs filed in court and not "*slanderous or libelous words*" uttered, as expressed in the statute.

Besides this the plaintiff distinctly affirms that the alleged false, slanderous and libelous recitals and averments contained in the

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pleadings, were *authorized* and directed by the defendants as clients and parties to that litigation; and that, therefore, they were primarily liable therefor.

It is our opinion that the distinction plaintiff's counsel has made is quite clear, and that our learned brother of the District Court has fallen into error in not sanctioning and maintaining same.

An illustration of this rule may be found in *Randall vs. Hamilton*, 45 An. 1154; *Wimbish vs. Hamilton*, 47 An. 246.

In our opinion, the judgment appealed from should be reversed and the suit reinstated and remanded to the lower court for trial.

The costs of appeal to be taxed against the defendants and appellees, and those of the lower court to await final judgment therein.

No. 12,451.

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49 599

STATE OF LOUISIANA VS. CHARLES JAMMERSON, ALIAS DOZEY,
ALIAS BLACK.

Jurisprudence recognizes the right of an accused to recant his confession made on arraignment and to supplant it by a plea of not guilty; but the trial judge may, in his discretion, refuse to allow the change when he is satisfied by the surrounding circumstances that the ends of justice can not be served by allowing the privilege.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *James Simon*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

A. & Chas. Fontelleu for Defendant, Appellant.

Submitted on briefs March 20, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

WATKINS, J. The defendant was indicted and convicted of petit larceny and sentenced to imprisonment in the State penitentiary for

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a period of six months, and from the sentence and judgment pronounced he prosecutes this appeal.

To sustain his appeal the defendant relies on a single bill of exceptions he reserved to the ruling of the trial judge, in refusing to allow him to withdraw a plea of guilty and substitute a plea of not guilty, and demand a trial by jury.

The bill of exceptions recites that the defendant's counsel did file a motion to withdraw his plea of guilty and substitute the plea of not guilty, and demanded an immediate trial. That the jury commissioners had drawn a jury for the fourth week of the term, which had not been discharged at the time said motion was filed, and that said motion was filed just as soon as he was able to secure the services of counsel to represent him.

The trial judge assigns the following as his reasons for declining to grant the defendant's plea, viz.:

"Because the party pleaded guilty at the beginning of the term, and makes this motion after the jury term has ended, and when there is no jury in attendance, (on account of which) he could not be tried before September next, the regular jury term of this court. If there was any doubt in the court's mind of the guilt of the accused, the court in its discretion might grant the request, although the accused is not entitled to it as a matter of course."

Because the jury for the fourth week was ordered not to report in court, as no cases were to be tried during the fourth week, the judge having given this order in open court on the Saturday of the third week.

And "because a confession of guilt *on an arraignment* is final, and can not be withdrawn without the State's consent, or consent of the court. No such circumstance exists in this case; and after a plea of guilty, nothing is left for the court to do but pass sentence."

There is nothing in the record to impeach this statement, and yet the insistence of defendant's counsel is, that, in point of fact, the withdrawal of the jury drawn for the fourth week of the term had not been formally ordered, nor had they been notified by the court not to appear.

In the present state of our jurisprudence we are dispensed from discussing that question, as this court is bound to accept, without question, the statement of fact contained in the judge's assignment of reasons which the bill of exception contains.

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In *State vs. Delahoussaye*, 37 An. 551, this court was called upon to deal with a similar question and in so doing said:

"Jurisprudence recognizes the right of an accused person to recant his confession made on arraignment and to supplant it by the plea of not guilty.

"But, it is clear that the judge may, in his discretion, refuse to allow the change when he is satisfied by the surrounding circumstances that the ends of justice can not be served by allowing the privilege.

"The facts shown by the record are sufficient to satisfy us that the trial judge exercised sound legal discretion in overruling the motion in this instance."

The ruling of the judge in the instant case was exactly in keeping with that decision.

Judgment affirmed.

No. 12,452.

STATE OF LOUISIANA VS. CHARLES JAMMERSON, ALIAS DOZEY,
ALIAS BLACK.

APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

A. & Charles Fontelieu for Defendant, Appellant.

Submitted on briefs March 20, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by
WATKINS, J. This case is identical with that of same title, *ante*,
p. 597, this day decided.

For the reasons therein assigned the judgment is affirmed.

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No. 12,299.

FENNER, HENDERSON & FENNER AND FARRAR, JONAS & KEUTT-SCHNITT VS. SUCCESSION OF D. C. MCCAN ET AL.

This suit was to recover on a *quantum meruit* for professional services.

The guardian who was sued for the value of the services had authority to sue; it follows that whilst present, in point of view of the law, she could be made a party defendant.

The provisions of the will could be defended and the professional services for the defence charged against the estates of those by whom they had been made.

The heirs, even after they have been placed in possession (under a decree not shown final) may be impleaded for a succession debt. They received the property *cum onere*.

The executor was not condemned personally to pay costs and therefore the judgment pleaded as *res judicata* did not have the effect of the thing adjudged.

The commission that an executor may receive is not such a pecuniary interest as will, on the ground of interest, render him personally responsible for the fee of counsel employed to defend the will under which he received his letters of administration.

The value of the professional services considered and the amount taxed to the succession.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Percy Roberts for Plaintiffs, Appellees.

E. Howard McCaleb for Mrs. Mary G. T. Stempel, Guardian,
Defendant, Appellant:

I.

This suit is brought by plaintiffs to recover for professional services rendered in the succession of D. C. and H. C. McCan. 48 An. 145.

II.

The court *a qua* had no jurisdiction over a New York guardian to makes the estates of her wards responsible for the attorney's fees claimed after she was authorized to remove the property out of this State. The authority of a foreign guardian over the estates of her wards is strictly territorial and does not extend beyond the State of her appointment. Am. and Eng. Ency. of Law, Vol. 9, p. 123; Bradf. (N. Y.) 334; 3 Redf. (N. Y.) 249.

49	600
49	1118
49	1431
113	108
49	600
116	28
117	546
117	549
49	600
123	510

A judgment against minors is not valid when the judge has no jurisdiction. C. P. 93. A curator *ad hoc* should have been appointed. C. P. 116.

III.

Professional services rendered in attempting to sustain wills containing substitutions and *fidei commissa* in violation of a prohibitory law can not be charged against the estates of minors. R. C. C., Arts. 1520, 11, 12.

IV.

After heirs have been sent into possession, by final decrees of a competent court, the successions are terminated and can not be impleaded. 30 An. 128; 25 An. 56, 220; 28 An. 446; 29 An. 888; 33 An. 830; 43 An. 1183.

V.

The judgment condemning Harry H. Hall, the trustee under the wills, to pay costs, has the authority of the thing adjudged against plaintiff's demand. 5 La. 107; 6 An. 129; Redfield on Wills, Vol. 1, 495; 1 McCarter, 135; 45 An. 89.

VI.

Attorneys can not recover remuneration for services from those who did not employ them. 5 An. 481; 27 An. 411.

VII.

Legatees, testamentary executors, administrators or trustees having a direct pecuniary interest in the maintenance of a will, must pay their own counsel fees, and can not shoulder the charge on the estate or the heirs. 8 An. 51; 13 An. 364; 28 An. 183; 11 Martin, 327.

VIII.

Harry H. Hall, the trustee, under the wills of the deceased, being pecuniarily interested in maintaining the trusts, and having charged commissions as trustee, is personally liable to the plaintiffs and not the minor heirs, represented by their guardian. 13 An. 590; 7 Ohio St. Rep. 143; 2 Watts (Pa.) 232; 7 Watts (Pa.) 170; 8 Watts & Serg. 441; 13 Pa. St. 569.

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IX.

The only question propounded for determination in the succession of McCan was whether the decision in the succession of Strauss violated the express provision of the Civil Code prohibiting substitutions and *adeli commissa*, and the established jurisprudence of the State construing this prohibition.

X.

Services rendered by counsel in succession matters under the eye of the court must be taxed by the court itself, regardless of the opinions of attorneys. 3 An. 518; 4 An. 578; 8 An. 66.

Argued and submitted March 5, 1897.

Opinion handed down March 15, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

BREAUX, J. Plaintiffs brought this suit upon a *quantum meruit*, for their fees for services rendered in defending the wills of the late David C. McCan and his wife, Mrs. Hester C. McCan.

The two wills left by them were duplicate of each other. In making these wills, the testators copied the wills in the Strauss case (Succession of Strauss, 38 An. 55).

These wills were probated and ordered executed. Harry H. Hall was appointed as sole testamentary executor, with seizin of the property. He administered the estate about two years.

Mrs. Stempel, mother of the grandchildren of Mr. and Mrs. McCan, a resident of the State of New York, was appointed guardian of her children.

Proceedings were instituted by her in matter of the succession of Charles P. McCan, her first husband, to have herself recognized by the Louisiana courts as the guardian of her minor children under the law of her domicile, New York.

She was recognized and procured an order sending her into possession of their property.

Her application was granted under the provisions of Articles 363 and 364 of the Revised Civil Code.

Subsequently, she instituted suit to set aside, annul and rescind

the testament of Hester C. McCann, widow of David C. McCann, and to cancel the probate of the testament on the ground that it contained dispositions reprobated by law, prohibited substitutions, *ad del commissa* and impossible conditions.

The executor considering it a matter of duty to defend the will against the attack of the guardian, employed counsel to represent him. Their services were rendered in this court and in the District Court for the parish of Orleans.

This court (while recognizing that it is preferable always for courts to yield to precedent, and to maintain, as far as possible, uniformity in jurisprudence), entertaining a decidedly different view of principle from that announced in the cited case, *ubi supra*, overruled the prior decision, and decreed that the provision keeping the estate from the legal heirs, must yield to the law; that under our Code the administration of the executor must end, whenever legally required by the heirs.

The executor, in compliance with the decree of the court, turned over the entire estate, amounting to about one million and a half dollars, to the guardian. Plaintiffs immediately after brought the present action for their services.

Counsel for defendant, before entering upon the argument of the issues raised by the exception and answer, controverted the authority of the lower court to render a judgment condemning a foreign guardian to pay to the plaintiff the sum claimed out of the estate of her wards.

The other questions, raised by the exceptions and answer, were, that plaintiffs' petition discloses no cause of action, because the services sued for were rendered in the ineffectual attempt to sustain wills made in violation of a prohibitory law; because the heirs having been sent into possession by a final decree of a competent court, the succession was terminated and could not be impleaded, because the right of an attorney to remuneration depends on a contract or appointment, and he can not recover from one who did not employ him, and, lastly, because the amount claimed by plaintiffs is unreasonable, excessive, and entirely disproportionate to the services rendered.

From a judgment condemning the defendant to pay the amount claimed she applied for and obtained an appeal to this court.

We take up the first issue before us for our determination, the

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authority, *vel non*, of the defendant to defend a suit brought against her wards to make them liable for a moneyed judgment.

Of course, the authority to sue is not questioned by the defendant, but her authority to be sued is denied by her.

It must be taken as true that, primarily, the rights and authority of guardians are circumscribed by the laws of the territory of their appointment. In conformity, however, with a settled principle of comity among the States of the Union, guardians are recognized and allowed to sue. Due recognition was given to her in this case, by an order of the District Court authorizing her to sue for and recover any property without the necessity of qualifying here as tutrix of the minors. Before this order was issued, proof had been made to the satisfaction of the court that the defendant here was a lawfully constituted guardian, appointed by the proper court, and had given bond at the court of her domicile in the amount required.

The guardian, in procuring her recognition, subjected herself to the form, manner, regulations and responsibilities provided by law in the matter of a tutorship. The rights of the tutor to sue necessarily implies the corresponding liability to be sued; an exception does not arise in case of a guardian, *quoad* his claim placed on the same footing as a tutor appointed here.

Otherwise, it would be giving a decided advantage to a guardian or tutor appointed under other laws than our own. "No nation," says Mr. Story, in his work on Conflict of Laws, p. 39, "will suffer the laws of another to interfere with her own to the injury of her citizens."

In our judgment, the demand of plaintiffs was not an independent demand, but one connected with and incidental to the claim presented by the defendant, which claim was subordinate to the right of creditors. "Succession is the transmission of the rights and obligations of the deceased to the heirs." C. C. 871. No reason suggests itself why the "obligations" provided by the Code should be, as relates to remedy, less binding upon foreign heirs than those within the limits of the State. One seeking a right as an heir must be held bound without regard to domicile, for the burden it imposes. He must take the benefit *cum onere*. In its broad sense, the maxim: *Qui sentit commodum sentire debet onus*, applies.

Under our law a home tutor sued, as in this case, would be held bound to defend the suit. It follows that the liability of a foreign guardian is not less.

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The defendant urged upon this court that a curator *ad hoc* should have been appointed and made a party to defend the suit. In our view such an appointment was not indispensable. Defendant, we think, by her pleadings came within the rule that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof. Story Conflict of Laws, p. 40. She was within the limit of the judicial authority of the State.

We will conclude upon this point by the statement that the suit was properly brought against the executor and the heir who had accepted the succession and who were in possession of the property of the succession.

Our attention is next directed to the issue; that the services sued for were rendered in the ineffectual attempt to sustain wills made in violation of a prohibitory law and the public policy of the State.

Even conceding for the moment that the will was as averred by the defendant and that the one by whom it was signed as testatrix sought to contravene the public policy of the State, it does not follow that the counsel who defended the will were parties to an act violating the law and contrary to public policy.

Counsel would be entitled to a fee, who, in good faith sought to maintain the provisions of a will annulled (despite the defence made) as in violation of law and the policy of the State.

But we can not overlook the fact that Mrs. McCan did not knowingly and intentionally violate any statute, and that, on the contrary, she had every reason to believe that she was, in making this will, acting entirely within the sanction of law.

Taking one thing with another, we think we are justified in the inference that an extreme position was advanced upon this point, in order to give greater force to the more reasonable proposition advanced, that an attorney can not recover from one who did not employ him.

Before taking up the issue; the authority *vel non* of the executor in matter of the employment of counsel, we deem proper to state that there was no objection raised, on the ground that two firms were employed. Our predecessors laid down a rule (Succession of Gayle, 37 An. 554), adverse to the employment of more than one counsel, entirely correct, as we think, in most cases.

But it appears, in this case, that the trial was expedited; that all

the parties concerned were anxious to facilitate an early adjudication of all questions involving the validity of the wills of Mr. and Mrs. McCan. In consequence it is claimed that the services were much more laborious and much more troublesome than they otherwise would have been.

Be this as it may, we propose to discuss the issue raised, of the absolute want of power in the executor to employ counsel to defend the wills, the validity of which was involved.

The executor is the mandatory of the deceased, his power is founded upon special confidence, he is bound to use every reasonable endeavor to comply with his wishes.

The duty, under the will, extends so far as to allow him discretion in the matter of employing counsel to carry out the trust confided to him as executor. The executor is the singled out friend who enjoys the confidence of the testator in the closing hours of his life. "*Il est chargé d'assurer l'exécution des dernières volontés du défunt.*" Laurent, Sec. 861, Vol. XIV. "*Dès que l'intérêt des légataires est en cause l'exécuteur a qualité pour agir.*" *Ib.*

The grandparents sought to secure during the minority of their grandchildren an administration of their own selection. The loss of their only son, the father of these children, and the second marriage of their daughter-in-law gave rise to great concern, even alarm, it is asserted on the part of the grandparents, for the future welfare of their grandchildren.

Having accepted the trust the executor could not consistently with his duty do otherwise than employ counsel and present the strongest possible defence against the attack of the mother and guardian of the children; against the validity of wills which had been duly probated. It became his imperative duty to do everything necessary to sustain the validity of the decree under which he held letters of executorship. It was not possible, without disregarding a plain duty, to deliver the large estates with which he had been entrusted by the owners for the purposes we have seen, without the least defence. It follows, the defence required, authorized the employment of counsel.

We pass to the next proposition argued, that the foreign guardian having been put in possession of the property of the successions, the courts here have no jurisdiction of a suit against her to recover a debt of the successions.

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Suit was brought against the executor and against the heirs. We understand from the record that the guardian was authorized to enter into possession of and remove from this State all the movable property. We do not understand that these estates have been fully administered and liquidated in such a way as to preclude creditors from recovering amounts due them. There was no final account filed, nor have we found of record evidence that the executor was discharged. *Leonard vs. Smith*, 28 An. 810.

Heirs in possession of succession property may be sued. *Soye vs. Price*, 30 An. 98. While it may be that practically the executor was discharged under the authority of the decisions just cited, in our view they, the executor and the guardian, were proper parties defendants.

This brings us to defendant's plea of *res judicata*. This plea is based upon the ground alleged that the executor personally, and not as executor, was condemned to pay costs in the case in which the services of the plaintiff were rendered and that the executor having complied with the judgment it had the effect of putting an end to the plaintiff's claim.

The executor was not personally condemned to pay the costs. The execution of the judgment, by putting the heirs in possession, does not operate as *res judicata*. The plaintiffs are the creditors of the succession and are not bound by the action of the executor.

The defendant, in the next place, insists that the professional services rendered at the instance of the executor in defending the will is not a legitimate charge against the estate. The executor would have, if this be the correct view, personally to pay counsel for services in defending the provisions of a will. Although the will of the testator should be obeyed, the executor, who is the personal mandatory of the deceased, would be, save at his own expense, without the power to employ counsel.

Our examination and study of the issues have not brought us to that conclusion. The defendant, in support of her contention upon this point, cites three decisions wherein it was held that an attorney can not recover from one who did not employ him, however valuable may be the result of his services to such person.

In the first case cited, *Roselius vs. Delachaise* (5 An. 481), the plaintiff who claimed for services rendered had not been employed by the defendant from whom he sought to collect a fee.

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In the second cited case, *Wailles & Matthews vs. Succession of Brown*, 27 An. 411, it was decided that an heir is without authority to bind the succession; that he alone should bear the expense of counsel employed by him, and not the succession of which he is one the heirs.

In the third case cited, *Cooley and Lacoste vs. Cecile*, 8 An. 51, the legatees were in possession of the property; suit was brought against them personally and not against the succession from which they inherited. These legatee were not charged with the execution of the testament assailed. Counsel sought to hold legatees responsible for their fee, by whom they had not been employed, on the ground that their services had enured to the benefit of all the legatees, and that the succession was responsible. The court did not sustain the claim. It was a matter personal to the legatees by whom counsel had been employed. Were it otherwise, every legatee might claim the right to defend title to property inherited, and at the expense of the succession, long after the succession had been closed.

Here the executor stood in the position of an agent vested with some discretion in carrying out the will. He derived his power from the appointment. It had been confirmed by a judgment of the court probating the will. It happened that the guardian of the only heirs sought to have it annulled, and that the executor alone was in a position to defend the provisions of a testament solemnly made, containing the last wishes of the decedent. The employment of counsel was proper, and established the relation between counsel and the succession of client and attorney.

The next propositions urged by the defendant are, in substance: That the executor had a personal interest, and, secondly, that the estate derived no benefit from the services of plaintiffs.

In support of her first contention, relating to alleged personal interest, the defendant cites several decisions of this State and of other States. The former (under the laws of this State), have uniformly held, as we appreciate them, that an administrator or executor, who has a personal interest to defend, or who has committed acts of mal-administration, can not have his interest protected or his illegal acts defended at the expense of the succession he represents.

No such issue is presented in this case. The commissions allowed are in compensation for services as administrator or executor, and

are not treated in any of the decisions that we have read upon the subject as a "personal interest" of the officer of the court through whose agency a succession is settled.

The complaint of the defendant, that the estate was not benefited by the services, was not a controlling issue. The services may not have resulted to the benefit of the estate in a material point of view, and yet, owing to the will of the grandparents, may be due by their successions. It was their last declaration in will form, which rendered necessary the employment of counsel. It binds their heirs.

That the amount claimed by plaintiffs is unreasonable, excessive and disproportionate to the services rendered, is the last defence urged by the appellant in opposition to plaintiffs' demand.

The plaintiffs were employed in two suits brought by the guardian to annul the wills; one of these suits was brought against the succession of David C. McCan and the other against the succession of Hester McCan. The case in the two successions involved large amounts. The questions involved were intricate. The counsel employed offered every guarantee which is required of the profession; independence, devotion to duty, industry and a thorough knowledge of the law.

They were opposed by a number of lawyers equally as able and indefatigable in the interest of their clients. The case was thoroughly argued orally and in briefs.

In other words the fee claimed possesses every element of value. First, position and eminence of counsel at the bar; second, importance of the question involved; third, responsibility assumed by counsel; fourth, extent and character of labor performed; except one which we have purposely omitted from this foregoing enumeration, i. e., the pecuniary interest involved. It was not as large as we infer it was thought by the worthy counsel who testified as expert before the District Court. The question was: Who should administer the estate, whether the foreign guardian or the executor as trustee? It was of importance, it is true, to carry out the wills of the grandparents; that of itself invested the issues with some magnitude and gave value to the services, not as great, however, as if the title to the property had been involved.

There was no question of personal interest in the sense of title to property.

Considering the question from this point of view, we think the

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judgment should be amended and the amount of the fee reduced to ten thousand (\$10,000) dollars, for all services claimed for defending the will of D. C. McCan and the will of Mrs. Hester C. McCan.

It is therefore ordered, adjudged and decreed that the amount of the judgment appealed from be and the same is reduced from twenty-five thousand dollars to ten thousand dollars; as amended the judgment is affirmed, at appellee's costs.

DISSENTING OPINION.

WATKINS, J. The plaintiffs, Fenner, Henderson & Fenner, and Farrar, Jonas & Kruttschnitt, two firms of attorneys at law, of the city of New Orleans, instituted this suit for the recovery of the sum of twenty-five thousand dollars, as the amount due them on a *quantum meruit*, for professional services rendered for the succession of the defendant, in a certain litigation involving the validity of the will of the decedent, under which the grandchildren were testamentary heirs, being at the same time the legal and forced heirs of the testatrix, and minors represented by a guardian appointed under the laws of New York.

The testament left by the deceased was in the olographic form, and her large and valuable properties and assets, of the aggregate value of one and a half millions of dollars, were bequeathed thereby to the aforesaid grandchildren, equally and in indivision. It made no special bequests of any kind. Of that testament, Harry H. Hall was appointed co-executor with David C. McCan, the husband of the testatrix; and the former became the sole executor, by reason of the fact that the latter died before the testatrix, and the rights of the testamentary heirs *thereby became absolute*, as, by the death of D. C. McCan, his right as universal legatee lapsed.

The will contained the provision that, during the minority of the testatrix's grandchildren, the money, the property and values given them conditionally be administered by his friend, Harry H. Hall; and he was directed to invest said moneys, in good securities or properties, and to apply to their education and support such a part thereof as may be necessary.

The will contained the following provision, viz.:

"I give all I may die possessed of to my grandchildren * * *
In case either of them die before attaining the age of majority, then the part or portion given as above conditioned to accrue to the sur-

vivors, likewise conditioned on such survivors attaining the age of majority; the true intent being to make my grandchildren my universal legatees, *upon condition that they reach majority*.

The will was duly probated, the executor qualified, and the administration of the estate began.

Some years afterward Mary Tobin Stempel, the mother and guardian of the minors, being advised that the quoted provisions of the will were obnoxious to our law as a prohibited substitution, and *fidei commissum* which rendered same absolutely null, instituted suit against the executor and prayed for a decree annulling the same, and decreeing the plaintiff entitled to immediate possession of the property of the deceased ancestrix, as the direct representative of the legal and forced heirs—terminating the trust of Harry H. Hall, and his administration as executor.

For full particulars and details of the pleadings and judgment in that case, I refer to our reports. Succession of McCan, 48 An. 145.

The executor retained the services of the plaintiffs, who undertook the defence of that suit; and also of one other of same import, relating to the succession of D. C. McCan, but which cuts no figure in this case, as it was a companion of the one first adverted to, and never came to trial. In my view, and I think that it can not be questioned—that litigation involved but a single question of law, and that was the *fidei commissary* character of the provision I have quoted. *Vide supra*.

Roundly and fairly stated, the question was whether the *administration* of the property of the testatrix, by a person designated in the will, during the minority of the grandchildren, was not the creation of a trust which is reprobated in our law; and that contention being sustained, that the administration should terminate, and the possession of the heirs be resumed.

This being conceded, it is apparent that the sole purpose of the suit was to rid the estate of this trust, and put the legal heirs in possession—that, and that alone.

Consequently, the value involved was nothing but the cost of Hall's administration, and not the properties of the estate. For it did not owe a dollar to any one, and there was no claimant adverse to the heirs, except H. H. Hall as *administrator of the revenues* of the estate.

The suit finally terminated in a judgment of this court annulling

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the will and decreeing the grandchildren entitled to immediate possession of the property and estate of their grandmother as her legal and forced heirs—the theory of the opinion of the court being that the will contained a *fidei commissum*.

It is for services the plaintiff rendered to the executor—in his capacity above explained—adversely to the contention and demand of the legal heirs, that they make claim in this suit for twenty-five thousand dollars as compensation. That demand is not predicated upon a contract, but upon a *quantum meruit*; and it is from that standpoint that this court is called upon to appraise and value those services, coming as they did within its cognizance and under its immediate observation.

There is no question in my mind as to it having been the legal right as well as the manifest duty of the executor, circumstanced as he was, to defend the suit and uphold the validity of the will, and for that purpose to employ counsel to assist him therein, notwithstanding he was and is a capable lawyer and a leading member of the legal profession.

He had before him as exemplars the case of Succession of Macias, 31 An. 127, and the case of Succession of Straus, 38 An. 55.

But this court having found and decided that those cases were not a proper foundation for the will of the testatrix and decreed it to be a nullity, the question arises as to what extent the succession and legal heirs were *actually benefited* by plaintiff's professional services. From the standpoint of the executor there is no doubt that the succession and *testamentary* heirs were to have been *prospectively* benefited by the maintenance of the will through the instrumentality of his attorney's assistance; but, having lost the suit and the claims of the *testamentary* heirs having been defeated by the annulment of the will, the question is as to the *obligation which was imposed upon the succession thereby*, which the legal heirs were necessitated to pay, as a condition precedent to their taking possession thereof.

There is not any question—indeed, there could not be—of the ability, energy, integrity and assiduity of the plaintiffs as lawyers, or with regard to the value of their services, taken as an abstract proposition relating to the executor in his relations to the estate, but, in my opinion, their value taken in respect to the resulting benefit to the legal heirs is quite another thing. If I am correct in the assumption that there was nothing involved in the original liti-

gation except the administration of the succession and the investment of its revenues during the minority of the testamentary heirs, the possible benefits thereof to the executor and to Mr. Hall personally could not have amounted to more than fifty thousand dollars in round figures, the proof disclosing that he has already received from the succession over thirty thousand dollars.

Taking that amount as the basis of my calculation, in my opinion ten per cent. on that sum—that is, five thousand dollars—would have been a reasonable compensation for the services of counsel if they had *successfully* resisted the suit of the legal heirs to annul the will, but having been unsuccessful, the judgment of this court awards them just twice that sum.

In Succession of Heffner, *ante*, page 407, we had under consideration a question quite similar to the one under investigation in this case, with the important exception that in the Heffner will there were several special legatees named, and among the number the executor was mentioned as a legatee for about one-third of the estate, which aggregated about fifteen thousand dollars or twenty thousand dollars. In the suit for the annulment of the will the various legatees were made parties, and they united with the executor in resisting the suit of the legal heirs to annul the will and likewise the special legacies. The executor and the legatees united in the employment of Messrs. Wise & Herndon, attorneys at law, of the city of Shreveport, to represent their mutual interests in the suit, and they did so represent same in the District Court and in this court, and unsuccessfully, the will having been annulled.

Upon the final account when filed the fee of the attorneys was placed at the sum of five hundred dollars, that is about two and one-half per cent. upon the total value of the estate, or ten per cent. upon the total interest of the executor. The District Judge rejected this item on the account entirely, but upon appeal to this court the same was restored to the extent of allowing to the attorneys the sum of three hundred dollars only—a little more than one-half of the amount originally claimed.

There can be no question of the ability, integrity or assiduity of the attorneys employed. None of the exact applicability of that case to the instant one; except as to the fact of the special legatees having been joined with the executor, thus making it a stronger case for the allowance of fees.

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And, pursuing the theory announced in that case, it seems to me that twenty-five hundred dollars for the services of the plaintiffs is the full *quantum meruit* value of them; and that only for that amount did the succession incur any legal obligation. And in view of that opinion the legal heirs ought not to be called upon to reimburse the executor any further sum.

For these reasons, I respectfully dissent from the opinion of the majority of the court.

No. 12,446.

STATE OF LOUISIANA VS. ARMILLE VEILLON.

The court again affirms that the statement of the judge in signing the bill must prevail when there is a conflict between the statement and the recitals of counsel.

When no subpoena for a witness not served, and no attachment for the absent witness who has been served, are asked by the accused when his case is called for trial, a continuance is properly refused, when at a later period, (in this case the day following that when the case was first called) the continuance is sought on account of the absence of the witnesses.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Dupré, J.*

M. J. Cunningham, Attorney General, *R. Lee Garland*, District Attorney (*C. W. DuRoy* of Counsel), for Plaintiff, Appellee.

John N. Ogden and *E. P. Veazie* for Defendant, Appellant.

Submitted on briefs April 3, 1897.

Opinion handed down April 12, 1897.

Rehearing refused April 26, 1897.

The opinion of the court was delivered by

MILLER, J. The accused, sentenced for larceny, appeals, relying on bills of exception in which he claims he was forced to trial on admissions by the District Attorney under the Act No. 84 of 1894, and denied the benefit of witnesses giving their testimony before the jury.

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Of course, we must be governed by the statements of the trial judge when they conflict with the recitals in the bill. The judge states explicitly in signing the fifth bill of exceptions that while the District Attorney did make an admission with reference to the testimony of absent witnesses, the admissions had no influence on his ruling, and the judge assigns other grounds for his ruling.

The first bill was to the refusal of an attachment to secure the presence of an absent witness, the father of the accused. The bill recites the accused was forced to trial on the admission of the State that the witness would give the testimony stated in the affidavit of the accused. The judge assigned other grounds. The second bill is to the refusal of the judge to order a new subpoena for a witness not found on the first summons. The third bill is to the refusal of a continuance on the ground of the absence of three witnesses, and the fourth bill in the order not of time of presentation to the judge, but last in the order of discussion here, is to the refusal to suspend further proceedings in the trial to obtain the presence of the absent witnesses.

The statements by the judge in signing these bills is substantially: the case was fixed and called for trial on the 9th of February, the State then ready, but there was a continuance to the following day to obtain the attendance of defendant's witnesses, it being disclosed that one had been served, but was not present, and the other not served, because of the inability of the sheriff to find him. It appears that on the 9th of February neither a subpoena for the one or an attachment for the other was asked, and in this condition the case was continued to the 10th. On the evening of that day, an attachment for the witness served was asked and allowed, without prejudice to the State, and the trial proceeded; the application for a new subpoena was refused at that stage for a witness known on the day before to have not been served. It seems, too, by the bill that the accused had the benefit of another witness, who testified to the same effect attributed to the absent witness by the affidavit of the accused. It is shown that the trial begun on the 10th, was not concluded until the 11th, at 8:30 P. M., ample time, the bill states, to have obtained the attendance of the witness, asked to be attached if the accused had availed of the permission accorded by the court. Subsequently, there was an application for a continuance on account of the absence of the witnesses, and still later, another

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application on the second day of the trial, to suspend further proceedings until the attendance of the absent witnesses could be secured. Both applications were refused and bills reserved.

The argument in this court has been largely directed to the act of 1894, authorizing the State to force the trial of criminal cases on admitting that the absent witness relied on by the accused would testify as claimed by the accused. But this contention must be laid out of view under the statements of the trial judge. The right to continuance must be tested by the other grounds assigned on the bill.

In criminal cases, it is not an unreasonable requirement that the accused, desirous of securing attendance of absent witnesses, should make a timely application for the requisite process. The brief for the accused alludes to the informal fixing of the case for the 9th. As we read the bills, the case was fixed for that day and continued. Then on the 10th, when the case came up, we have before us an attachment granted, with a qualification that still would, in all probability, have secured the attendance of the witness in time. But the accused did not avail of the privilege given him. We have later in the trial, on the following day, the application for a continuance, and then still later, for a suspension of proceedings. Dealing only with the questions submitted by the bills restricted by the statements of the judge, we are constrained to hold there was not sufficient diligence exhibited for the continuance asked by the accused. Our view on this, the controlling question, disposes of others discussed in the briefs, or rather renders unnecessary any expression of our views beyond the issue, we think, determinative.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 12,456.

E. A. O'SULLIVAN VS. THE CITY OF NEW ORLEANS.

The city charter restricts the compensation of the city attorney to his salary and excludes the charge by him for services in a suit brought against the city to revoke a legacy for the benefit of the poor. Charter, Act No. 29 of 1882, Sec. 27.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

O'Sullivan vs. City.

Farrar, Jonas & Kruttschnitt for Plaintiff, Appellant.

Samuel L. Gilmore City Attorney, *W. B. Sommerville*, Assistant City Attorney, for Defendant, Appellee.

Argued and submitted April 2, 1897.

Opinion handed down April 12, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff appeals from the judgment dismissing his suit for a fee for professional services as attorney for the city, in a litigation in the United States Circuit Court, in which the legacy to the city for the benefit of the poor, made by the will of D. V. Sickles, was sought to be revoked by his heirs. The answer is that the plaintiff was the attorney for the city elected under the charter, and that the claim for compensation for professional services beyond his salary is excluded by the charter.

The section of the charter bearing on the controversy is as follows:

"SEC. 27. The City Attorney shall be the legal adviser of the corporation on all matters in which his advice may be necessary, and represent said corporation within the State in all judicial proceedings, suits, acts and contestations in which it may have an interest as hereinafter provided. No extra compensation or fee shall be allowed him, and no attorney shall in any case be appointed to assist him, unless by a vote of two-thirds of the members present of the council; he shall receive a salary of three thousand five hundred dollars per year. He shall have the appointment of all assistants or assistant counsel that the council may allow him. He shall be appointed by the council for the term of four years."

The plaintiff's services were to preserve the legacy by D. V. Sickles made to the city years ago for the benefit of the poor. The fund, increased by investments and accumulation, forms no portion of the resources of the city for the support of the municipal government. The fund has always been kept apart and distinct and the power of the city is, we think, one of administration. From this it is argued that the services for which plaintiff claims compensation, are to be deemed not within the charter provision as to his fees,

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because rendered in the interest of this separate fund. We are of the opinion, however, we are not at liberty to construe the charter in accordance with the argument urged on plaintiff's behalf. The city, as the custodian and administrator of the fund, was sued. It was part of the functions of the city to defend the suit, and under the charter the city was restricted for the defence to the City Attorney, made by the charter the legal adviser of the corporation, with the duty of representing it in all suits and proceedings in the State. The language embraces, in our view, all suits in the State directed against the city. Though this suit to revoke the Sickles fund was one not affecting the *fisc* of the city, yet it was directed against the city as the custodian of a fund for the poor. With every desire to construe the charter so as to afford compensation for useful professional services, we are led to the conclusion the charter excludes the plaintiff's demand.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

No. 12,409.

THE STATE OF LOUISIANA VS. NICHOLAS B. NAMIAS.

The market ordinance of the city of New Orleans, prohibiting the sale of vegetables or fruits by peddlers or others within six squares of a public market, is valid. Dillon on Municipal Corporations, Sec. 880.

A PPEAL from the First Recorder's Court of New Orleans.
Finnegan, J.

James J. McLoughlin, Assistant City Attorney, and *Samuel L. Gilmore*, City Attorney, for City of New Orleans, Plaintiff, Appellee.

Sholars & Schreiber for Defendant, Appellant.

Argued and submitted March 17, 1897.

Opinion handed down April 12, 1897.

The opinion of the court was delivered by

MILLER, J. The defendant, prosecuted and fined for selling fruits

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and vegetables within six squares of a public market prohibited by an ordinance of the city council, takes this appeal, and claims the reversal of the sentence on the ground of the unconstitutionality of the ordinance.

The ordinance prohibits all sales in the public markets, after 12 o'clock M., except fruits and meats in limited quantities, and prohibits the sale of fruits, vegetables and other articles of food within six squares of the public markets by peddlers. The defendant is a peddler of fruits and vegetables, and assails that portion of the ordinance which excludes him from selling within the area of six squares of the public markets.

The defendant's contention is, that the sale of fruits and vegetables within the prohibited area can not be deemed injurious to the public health, or cleanliness of the city, and hence the ordinance in this respect is not the exercise of the police power; he further contends the ordinance prohibiting the peddler, but allowing sales of vegetables and fruits within the six squares by grocers, is unequal, oppressive and unjust, and in all aspects the prohibition placed by the ordinance is assailed as unconstitutional.

It is pressed on us with great earnestness of argument that the courts have the full power to scrutinize ordinances of the council professing to exert the police power, and to protect the citizens from the abuse of the power. Hence, it is argued, that the ordinance, prohibitive of sales of fruit and vegetables, not decayed, but sound and fresh, having no relation to public health, should be held by us as not sanctioned by the police power. We have given full attention to the line of authority cited in this connection. It may be conceded, as it is put in one of the cases cited by defendant, it is for the legislative department to determine when the occasion arises for the exercise of the police power, but the subjects on which the power is exerted is for judicial decision. The police power has its limitations and whether exerted within those limitations, is necessarily a judicial question. *Cooley's Constitutional Limitations*, p. 568; *Horr & Bemiss on Municipal Police Ordinances*, par. 217; *Toledo Railway Co. vs. Jacksonville*, 67 Ill., p. 37. If therefore this ordinance transcended the police power, our duty to declare it could not be questioned.

The market ordinances in their general scope have been frequently called in question before our courts. *Morano vs. The Mayor*, 2 La.

217; *First Municipality vs. Cutting*, 4 An. 335; *City of New Orleans vs. Stafford*, 27 An. 417. It is true in the previous decisions the precise phase of this controversy was not presented. But the power of the council to fix the time, place and mode of selling food was discussed. The conclusion was such legislation was essential to the good government of the city, and that the power to prohibit sales of food for the daily consumption of the city was implied by the power to fix the location of the public markets. The locations of the public markets and the prohibition to sell elsewhere are linked. Public markets of absolute necessity, cannot be maintained without judicious restrictions to prevent sales in other places of food commodities. That restriction under this ordinance, and the law, is the restraint of such sales within six squares of the public market. Act No. 100 of 1878, p. 152. As Judge Dillon puts it: Under the delegation of the police power the municipal corporation may establish markets and prohibit sales and purchases of marketable articles, except at designated market places. 1 Dillon Municipal Ordinances, Secs. 313, 1380, last edition. It is not then sufficient, in support of the objection to the ordinance, to say that the sale of fresh vegetables or fruit within six squares of a public market has no tendency to menace the public health. Public markets cannot be fixed at designated places if marketable commodities can be sold anywhere by peddlers. Hence the ordinance, in our opinion, is to be supported, because part of the usual municipal function to establish markets.

It is urged on us that the ordinance is oppressive inasmuch as grocers are permitted, or at least left under no prohibition as to sales of fruits and vegetables. We do not think this would authorize us to hold the ordinance void. The distinction, whatever its effect, is the mere incident of a valid ordinance. Nor do we appreciate that the non-enforcement of this ordinance in the markets can support an objection to the ordinance itself.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

Vancleave, Jr., vs. Nelson et als.

No. 12,420.

R. A. VANCLEAVE, JR., VS. NELSON ET ALS.

A vendee, seeking practically the annulment of a contract of sale, cannot ask restoration of the price without proposing restitution of, or accounting for, the property bought.

An agreement entered into, with a third person, by members of a firm, on its dissolution, whereby each binds himself individually to the obligations set forth, and one of the members subsequently violates the agreement, the others, formerly his copartners, are not liable.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

W. S. Parkerson for Plaintiff, Appellant.

B. B. Howard for P. H. Davies, Defendant, and *Henry O. Hollander* for A. J. Nelson, Defendant, Appellees.

Argued and submitted March 17, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

BLANCHARD, J. The plaintiff is the proprietor of the Crescent City Cornice Works and the defendants were proprietors of the Nelson Cornice Works.

Both firms did business in the city of New Orleans, and there was business rivalry between them.

On May 24, 1895, plaintiff bought out the business, stock of material on hand, fixtures, working tools, etc., of defendants, including the good will of the establishment and all contracts and open and outstanding accounts.

The consideration of the sale as expressed in the notarial act was five thousand dollars, in cash and notes. The real consideration was only four thousand seven hundred dollars, one of the notes given, for the sum of three hundred dollars, having, pursuant to previous understanding and agreement, been canceled and returned to the vendee. Excluding the note so returned, all the notes given

Vanolive, Jr., vs. Nelson et als.

have been paid, except one for seven hundred dollars, which was made payable one year from date of sale, and two for fifteen hundred dollars each, both payable two years from date of sale. These notes bear eight per cent. interest per annum from their date, were payable to the order of their maker and were by him endorsed and delivered to the defendant Percy H. Davies.

When the business of the Nelson Cornice Works was organized, Davies furnished all the capital, his partner, Nelson, putting in as against this only his knowledge of, and experience in, such business. The business was conducted less than two months from its inception before it was bought out by plaintiff. In the negotiations leading up to the purchase, it was understood by and between the partners Nelson and Davies, with the knowledge of plaintiff, that Nelson, who had no capital in the concern, was to have but one thousand dollars of the proceeds of the sale, and Davies the remainder, three thousand seven hundred dollars. Also that Nelson was to be paid first, taking the cash paid on account of the purchase price (four hundred dollars) and the first three notes to fall due, each for two hundred dollars, due respectively at sixty, ninety, and one hundred and twenty days from date of the sale. The cash payment and the three notes, at two hundred dollars each, were delivered to him.

The firm known as the Nelson Cornice Works, composed of Albert J. Nelson and Percy H. Davies, defendants herein, was immediately dissolved on the consummation of the sale referred to.

Six months after the date of the sale plaintiff brings this action, recites the terms of the sale, alleges he has paid thirteen hundred dollars of the purchase price, and still owes the three notes described above; that the defendants, in violation of their contract, were engaged in the same business, in opposition to himself; that the money paid and notes given defendants were far in excess of the actual value of the materials transferred by the sale; that the chief value of the contract was the good will of defendants' business and the obligation not to engage in business in opposition to him; that owing to the violation of the contract the consideration of the notes had failed; that he is entitled to have them restored to him and canceled, and to recover from defendants, *in solido*, the thirteen hundred dollars already paid.

He prays judgment accordingly, as well as for sequestration of the notes during the pendency of the suit.

In the thirteen hundred dollar money judgment which plaintiff claims, it will be noted he includes the amount of the three hundred dollar note which was canceled and returned him by the vendors.

The allegations and prayer of the petition virtually make this a suit to set aside and annul the contract of sale. though the petition does not *express* this in so many words. And while asking the restoration of the price represented by cash and notes, the vendee proposes, on his part, no restitution of, or accounting for, the property bought.

Defendants filed separate answers through different counsel. Both deny violation of the stipulations of the contract of sale, and aver that the stock of materials and other property conveyed to plaintiff were fully worth the price agreed on.

Defendant Nelson alleges in his answer that "the Nelson Cornice Works" which he and Davies had carried on, did not constitute a commercial partnership, but was the joint ownership of a factory, and that the business connection was long since dissolved to the knowledge of plaintiff. He also urges that at the time the sale was effected it was agreed that he (Nelson) should take for his share of the purchase price the first notes falling due, and that it is within the knowledge of plaintiff that these notes have been settled and that thus he (Nelson) has been paid in full.

Defendant Davies pleaded in his answer that the contract with plaintiff only bound him *individually* not to re-engage in business in opposition to plaintiff, and that he had not violated the obligation in any manner.

There was judgment in the court below rejecting the demand of the plaintiff and dismissing the suit, reserving to the plaintiff whatever rights he may have against the defendant Albert J. Nelson.

Plaintiff appeals, and in the brief filed on his behalf he asks this court to adjust the differences between the parties.

We quote from his brief as follows:

"He now asks that the court declare that he is liable only for the amount which the tools, machinery and materials were actually worth, regardless of any question of good will or competition." He furnishes a statement of account, striking a balance of one thousand one hundred and eighty-six and ninety-seven one hundredths dollars, which, he says, he "should be decreed to pay to the defendants."

We are at a loss to reconcile these statements and requests of his brief with the prayer of his petition, which is as follows:

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"That there be judgment in favor of petitioner and against the defendants * * * *in solido* in the sum of thirteen hundred dollars * * * and canceling and restoring to petitioner three certain promissory notes, * * * one for the sum of seven hundred dollars, payable one year after date, and two each for the sum of fifteen hundred dollars, payable two years after date," etc.

The prayer of the petition determines the character of an action, and while it is true that sometimes evidence unobjected to supplies pleadings, we are not prepared, from the testimony found in this record, to apply the doctrine to the instant case.

Nor does it help the plaintiff that his petition concludes with the prayer "for all such general and special relief as the nature of the case requires and law and equity grant."

Defendants were invited into court to meet certain specific allegations upon which was based a specific demand for relief. Their answers were framed to meet the case thus presented, their evidence to respond to the issues thus raised.

To this case and these issues the parties were confined in the court below, and so they must be here.

Whether the clause of the contract under consideration, whereby defendants bound themselves "not to engage or be employed, at any time hereafter" in the same business in which plaintiff is engaged and in opposition to him, without his written consent, is or is not in restraint of trade, against public policy and forbidden by law, as insisted on by defendants, we do not find necessary to decide.

Nor is it necessary to determine whether or not the Nelson Cornice Works was a commercial partnership, nor whether the partners therein were or not bound *in solido* for the transactions of the partnership business.

The case, in our view, turns upon the construction to be placed upon the following clause of the contract between the parties:

"The above named vendors do by these presents bind themselves *individually* not to engage or be employed, at any time hereafter, in any business of cornice, ornamental and light sheet metal works in opposition to the present cornice works and business of R. A. Vancleave, without the written consent of the said Vancleave." (*Italics ours.*)

Whether the vendors in that act of sale were commercial partners and as such bound *in solido*, or not, it is clear that in

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the clause quoted, and for the obligations therein assumed, they did not intend to bind themselves, and did not bind themselves *in solido*; but each spoke for himself individually, each bound himself, and only himself, not to do the things therein stipulated against. They did not act in that clause as partners in a business firm or concern; by the plain, unambiguous language used, they excluded all such idea.

The sale to plaintiff dissolved the copartnership existing under the name of the Nelson Cornice Works.

An agreement entered into, with a third person, by members of a firm, on its dissolution, whereby each binds himself individually to the obligations set forth, and one of the members subsequently violates the agreement, the others, formerly his copartners, are not liable.

After the dissolution of a copartnership, no act of one member of the firm can bind or affect the other member of the dissolved partnership. *Dodd, Brown & Co. vs. Bishop & Co.*, 30 An. 1180; *Meyer, Weiss & Co. vs. Atkins*, 29 An. 588.

The testimony establishes conclusively that the defendant Davies did not in any way violate the obligation of the contract with plaintiff.

The three notes aggregating thirty-seven hundred dollars, which were sequestered in this suit, are his property, and as he did not himself violate the contract, and did not obligate himself to restrain Nelson from so doing, it is difficult to see on what grounds either he or his property can be held amenable to plaintiff's demand.

Whether the defendant Nelson has violated the agreement, we do not here decide. We do not deem the present action the proper one in which to determine that question.

The judgment appealed from reserves whatever rights plaintiff may have against this defendant, Nelson, and this judgment, in all respects, is affirmed.

No. 12,274.

SUCCESSION OF GEORGES ANDRÉ PETIT.

The principle resting on national comity that gives to the law of the domicile of the owner extra-territorial effect with respect to his movable property, does not exact that our courts should give effect to the foreign law creating a title to movables subject to the administration of a succession in our courts, when

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that title is repugnant to the text and spirit of our law of inheritance, placing as the foreign law does the natural child as an heir on the same footing as the brothers and sisters of the deceased, and when the court is called on to enforce such foreign law to the prejudice of the Louisiana heirs. *Story's Conflict of Laws*, Secs. 18, 23, 25, 550, 888, 862; 2 An. 599, 603; 11 An. 289; 10 An. 772; 5 N. S. 596; 2 N. S. 98.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Henry Chiapella for Administratrix, Appellee.

Denègre, Blair & Denègre for Tutrix of Minor, Appellee.

Argued and submitted February 2, 1897.

Opinion handed down March 1, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal from the judgment dismissing the opposition to the account of the administratrix of the succession, asserting the right of the minor, Jean L. O. Petit, as the duly acknowledged natural child of the deceased to one-half of the proceeds of the succession property.

The deceased, George A. Petit, died in France, his domicile for years. By his last will he constituted the mother of the minor Jean L. O. Petit his universal legatee, but the will was annulled by the competent court in France. His legal heirs are his sisters and a brother, two residing here, one in Mississippi and one in France. The minor on whose behalf the opposition is filed was duly acknowledged by the deceased in France as his natural child. The administratrix, in due course of administration, has sold and realized the proceeds of part of the succession property, has exhibited in her account the fund for distribution to the heirs, excluding from any participation in the distribution the natural child of the deceased.

Under the Code, if the deceased, dying intestate, leaves no descendants or ascendants, his legal heirs are his brothers and his sisters, or their descendants. The natural child duly acknowledged is called to the succession of his father only, when he leaves

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no descendants, ascendants, collaterals, or surviving wife. Civil Code, Arts. 911 *et seq.* 917, 918. The account proposes that distribution the Code prescribes, when the deceased, as in this case, making no will, that made in France having been annulled, leaves brothers and sisters and no ascendants or descendants.

It is claimed on behalf of the minor that his right to one-half of the property of the succession is fixed by the judgment of the court in France, and it is insisted that judgment is *res judicata*. We find no occasion to deal with the effect of a judgment rendered by the competent tribunal of one country contradictorily with the parties by or against whom the judgment is pleaded in the courts of another country. The suit in France was brought by the heirs at law to set aside the will, on the ground that the universal legatee, the mother of the minor, was interposed for his benefit, to evade the provisions of the Napoleon Code, forbidding testamentary dispositions in favor of natural children, when such dispositions trenched on the portions reserved by that Code for brothers and sisters of the deceased. The under-tutor of the minor joined in that suit, asserting his right and making his mother a party. We understand the French judgment as annulling the will and as withholding any decision in reference to the distribution of the Louisiana property. The material part of the decree is: "Declare nul le legs fait à la dame Bayly, en ce sens que le mineur Petit n'a droit qu'à la moitié de l'actif de la Succession; débouté la dame Bayly de sa demande en délivrance du dit legs" * * * And the court adds: "Attendu que de la succession comprend des biens sis en France et des biens sis à la Louisiane; que les législations qui régissent les dits biens peuvent être différentes; que le Notaire commis pour le partage prendra tous renseignements et en cas de difficultés donnera son avis avec l'estimation des immeubles et fera soumettre au Tribunal les questions douteuses et litigieuses" * * * Wholly independent of this decree the status of the minor child had been fixed by the acknowledgment in due form by the father. That status was not in controversy, but conceded when the heirs at law brought the suit to annul the will. In our appreciation the decree is not the basis of the demand of the minor asserted here, and hence the decree is not *res judicata* in support of his demand in our courts to take one-half of the property of the deceased. He stands before us simply as the natural child of the deceased claiming a distribution accorded to him in France, but which our Code denies to natural children.

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The general principle, not of statutory recognition, but enforced by the comity of nations, is that the law of the domicile of the owner should govern his contracts as to personal property and the distribution of that property when he dies. Hence, it is argued that as the law of France, the domicile of the testator, gives the natural child one-half the property of his father who leaves collateral heirs, that law and not our Code must control the distribution of the movables of the succession in Louisiana, the argument conceding that our law governs the right of inheritance to all immovable property here. The principle that gives the foreign law operation in any other country, based entirely on international comity, is subject to exceptions. The personal capacities and disabilities fixed by the law of the domicile of the party, as a general rule, will operate on him in other countries, yet even these personal laws are not enforced by the courts of other countries when that enforcement would prejudice the rights or interests of their citizens. Again, the foreign law will not be enforced by the courts of another country in aid of a contract made abroad, when the rights of the citizens of the country in which the enforcement is sought would suffer, although the property within that country, the subject of the contract, is movable. Story, *Conflict of Laws*, Secs. 23, 25, 550, 386, 362; *Olivier vs. Townes*, 2 N. S. 98; *Saul vs. His Creditors*, 5 N. S. 597; *Lee vs. Creditors*, 2 An. 603.

If these exceptions exist to the operation of the foreign law, on property in another country, it is not easy to appreciate why the foreign law, utterly opposed to the spirit and policy of our legislation, should be admitted by our courts to control the distribution to the heirs of the deceased of movable property here, merely because the deceased was domiciled in the country, the laws of which it is proposed to substitute for our own. In the argument for the natural child, it is urged that our Code recognizes his heirship, and hence the inference is sought to be supported of no difference in the policy of France and Louisiana on that subject. The difference, in our view, is radical. Under the Napoleon Code the natural child is placed on a footing of equality as respects the right of inheritance with the brothers and sisters of the deceased. Our Code, on the contrary, excludes the natural child from any inheritable right to the succession of the father, unless his succession would otherwise go to the State, and the Code thus viewing

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the natural child, places him under the rubric of the Code of irregular heirs. Arts. 757, 912 *et seq.* If in this case, then, we are to give effect to the French law, we disregard the spirit and text of the Code as well as the public policy, the basis of our law on this subject; in thus deviating from our policy and legislation we deny the right of inheritance our Code confers on two of our citizens included among the collateral heirs of the deceased: we enforce to their prejudice a title utterly repugnant to our system and derived solely from the foreign law and the force given to it, as is claimed by the comity due from one to another State. We are not aware of any case in which international comity has been thus applied.

The types of decisions of the class cited in the briefs in support of the claim of the natural child are numerous. The courts of one country charged with the administration of an estate, the principal administration being conducted in the courts of another country, the domicile of the deceased, will in a spirit of comity direct the transmission of the succession funds to the foreign country for administration there, but not until the claims of our own citizens are satisfied. Debts for many purposes will be deemed to follow the owner and be controlled by the law of his domicile. Succession of Alice Packwood, 9 Rob. 443. In a contest between heirs all foreign our courts will ascertain their rights in respect to movable property here by the standard of the law of their foreign domicile, as was well illustrated in the leading case of the heirs of Kosciusko. *Ennis vs. Smith*, 14 Howard, 400. The right of a foreign administrator to control personal property will be recognized when no prejudice to our citizens is operated. In these classes of cases and others in which there is no right asserted affecting our own citizens or repugnant to our law and public policy, our courts will give effect to the foreign law in subjecting to its operation movable property here. To all the cases cited on behalf of the natural child we have given attention and we have endeavored to indicate the difference in principle between that applied in those cases and that involved in this case.

We are not at liberty to enforce in this case the foreign law, because, in our view, the comity of States does not exact the recognition by the courts of one country of the title of an heir based on the foreign law opposed to our own law and detrimental to our own citizens, if enforced. We think that in the discussion of the subject by the jurists the limit of comity we have indicated finds recogni-

Brewing Association vs. McGowan.

tion. In our own jurisprudence with no direct adjudication on the particular phase presented in this case, we have expressions carrying great significance against admitting the foreign law to interfere with the distribution to heirs our Code establishes, although the property is movable and the owner had his domicile in the foreign country. Thus the husband, who under the common law becomes entitled to the personal property of his wife, or to a part of it, in one case to be found in our reports, endeavored to assert against the heirs under our law his right here, based on the foreign law to movable property of the deceased wife, under administration here. The claim was denied, but the authority of the case is weakened by the view expressed that the title of the husband was not complete under the foreign law. *Marcenado vs. Bertoli*, 2 An. 980. *Marcenado vs. Mordella*, 10 An. 772. The tendency of the decision is, however, against the title claimed under the foreign law opposed in that case to the order of heirship our law establishes, but not exhibiting that different and more impressive phase of repugnance to our Code manifest by the foreign law we are called on in this case to enforce. There is the greater reason to deny the operation here of the foreign law.

There is another view. Our Code gives effect to wills made out of the State on movable property within the State. There is no will in this case; that made in France having been annulled. When our courts carry into effect the testament made abroad we execute the will of the deceased, not the foreign law. When there is no will, subject to such modifications as international comity demand, our courts enforce our law in distributing property within our jurisdiction to the heirs of the deceased owner. It is the law, therefore, of Louisiana that must be applied in this case, and that application is made by the judgment before us on this appeal. Civil Code, Article 10,491.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

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No. 12,269.

ANHEUSER-BUSCH BREWING ASSOCIATION VS. JAMES MCGOWAN.

The defendant had waived citation, but not the legal delays. The default was prematurely entered.

Brewing Association vs. McGowan.

There was nothing irregular about the waiver of the citation and nothing to give rise to a presumption that the defendant confessed judgment, or admitted the correctness of the demand.

The court had jurisdiction. A judgment can not be impeached in any collateral proceedings on account of errors or irregularities not jurisdictional.

A premature judgment by default was not an absolute nullity.

In this suit by the wife against the husband for separation of property, there was nothing to show that the judgment was procured with fraudulent intent. The inactivity and silence of the husband, in the matter of irregularities in the case, has no greater effect than such conduct of any other debtor sued would have. There was nothing done in contravention of a prohibitory law (whose chief object is public utility), from which individuals can not derogate.

The irregularity did not go to the jurisdiction; the judgment was, therefore, not assailable collaterally, although procured by the wife against her husband.

Objection to "defect of form," not jurisdictional, could not be urged in the intervention proceedings.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Bernard Titché, D. B. H. Chaffe and John Dymond, Jr., for Plaintiff, Appellee.

Farrar, Leake & Lemle and Thomas J. Semmes for Mrs. Mary McGowan, Third Opponent, Appellant.

Argued and submitted February 1, 1897.

Opinion handed down February 15, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

BREAUX, J. The plaintiff, in execution of its judgment against the defendant, caused the seizure of real estate to which his wife held title of record.

The defendant's wife intervened, setting forth that she was separate in property by judgment rendered in the suit styled *Mary McGowan vs. James McGowan*, husband, and claimed the property acquired in her name, with separate and paraphernal funds since the separation.

The plaintiff denied that she obtained a valid judgment against her husband decreeing her separate in property, because it was rendered on the confirmation of a default prematurely taken.

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It appears that the plaintiff was a creditor of the defendant's husband before the date suit was instituted by the wife for a separation of property. This is not disputed by any one.

The facts are: In the suit for a separation of property, the defendant was not cited. He accepted service, waived citation, but did not waive the legal delays. The suit was filed on January 20, 1894; the plaintiff was authorized by the court to institute the proceedings for separation of property on January 22, 1894. A default was entered on the 25th of that month, and the judgment was rendered on the 7th of February following, on a motion to confirm the default.

The real estate under seizure was acquired by her since the separation. She bought it, she averred, with her own paraphernal funds.

The final paragraph of an agreement in the case reads:

"If the judgment of separation be held invalid the judgment on the whole case is to go against her (opponent) and the property seized is to be sold for account of the seizing creditors. If on the other hand it be in her favor, on that issue then the case shall be reinstated and be in the same position as if this agreement had never been entered into except as to the issue of separation."

The grounds of attack of the judgment are:

First, that it was a consent judgment.

Second, that it was an absolute nullity, because it was rendered on a default prematurely taken.

The wife, Mrs. McGowan, sought to meet the attack by urging that the nullity is not absolute, but relative, and that it can not be invoked collaterally by a plaintiff, a third person.

The court *a qua* decided that the judgment rendered in favor of the wife against her husband was an absolute nullity and the intervenor has appealed.

The plea urged by the plaintiff, that the husband consented to the judgment rendered in favor of his wife, is the first before us for our determination.

With reference to the acceptance of service and waiver of citation, it was not a waiver of delays for pleading; it did not authorize a judgment of default before the expiration of the ordinary ten days from the service of citation.

Under the clear terms of the law, as we interpret, it is as if suit had commenced by actual service of citation. Ordinarily there should not be given any greater effect to the acceptance of service,

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particularly when the delays are not waived, than if the suit had been commenced by citation and service of copy of the petition. It follows, then, that it is as if an actual service had been made instead of a waiver. *Powlis vs. Cook and Goldstein*, 28 An. 547.

We translate from *Baudry-Lacantinerie*, Vol. 3, p. 116: "A demand for a separation of property must be addressed to the court alone authorized to grant it. It can not result from any agreement between the spouses. This was the natural consequence arising from the immutability of conventions at time of marriage."

The wife's petition was, in the case before us, addressed to competent judicial authority. The decree was not based upon any agreement.

Passing to the default which was prematurely entered, the plaintiff insists that a judgment of confirmation of such a default was void, and that if it is not void, but voidable, it can not be the basis of any right against one who was a creditor at the date that it was obtained. The absolute nullity of the judgment *vel non* is the important question.

Where no notice, either actual or constructive, is given to a defendant, the decision rendered against him is void; if the decision was rendered before the delays have elapsed within which he was cited to answer, in our judgment the same result would follow. The court would not have been seized with jurisdiction.

It is different as to a default. The court had jurisdiction, although it was not taken and minute entry made as required. A judgment can not be impeached in any collateral proceeding on account of errors or irregularities, not jurisdictional. In our judgment the premature entry of a default is not an illegality going to the jurisdiction.

Jurisdiction had attached by the fact that there was of record a waiver equal in effect to the service of a citation and that the legal delays had elapsed when the judgment was rendered. Although the delays given in the citation had not elapsed, the Supreme Court of the United States in *White vs. Crow*, 110 U. S. 188, held that, in its opinion, the court, "having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumptions necessary to sustain it." Citing *Grignon vs. Astor*, 2 How. 819. "The defendant being in court was bound to take notice of its proceedings, and might have corrected

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the error at any time during the term." Adhering to our own jurisprudence, our views are not as far reaching. We think that citation and delays expressed in the citation are needful to the court's jurisdiction.

We quote from the decision only because the reasoning applies here with special force.

In a case in Iowa (Dorroh vs. Wilson, 26 Iowa, 116) the court held upon the same principle as the case cited *ubi supra* that the fact that the defendant was not served the number of days required by law did not render the judgment void.

The defendant in the case before us was informed of the remedy sought and the time and place where he was required to appear.

With reference to prematurity, in Mitchell vs. Allen, 14 P. 497, 498, it was held: "A judgment thus rendered is irregular only. It might have been set aside by motion or upon proceedings in error, but the judgment is not vulnerable to a collateral attack."

In this court Judge Martin, for the court, held that a defect in the proceedings occasioned by the want of a judgment by default was not an absolute nullity. Seymour vs. Cooley, 9 La. 72-79.

In the discussion of the issues this brings us to the question of fraud.

It is settled that a creditor may, in a collateral proceeding show that a judgment was procured through the fraudulent contrivance of the debtor or complicity of both parties with a design to defraud him. A dishonest and collusive judgment is open to attack when it comes in conflict with creditors. Fraud at no time can stand, even robed in a judgment.

But we are not informed by the evidence in the case before us that a judgment was confessed by the husband in favor of the wife, or that it was procured with fraudulent intent. In either case the judgment would be void against third persons to the extent of the confession or the fraud.

Lastly, the seizing creditor, conceding that the passive assistance of the debtor would not be fatal in ordinary proceedings, urges that the inactivity of the husband is fatal in cases of suits of separation by wife against her husband, because of the express provision of the Code, and that the law imposes upon the wife the burden of proving the validity of her judgment, and for that reason a relative nullity is as fatal as an absolute one.

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It is well settled that the wife, to recover a judgment, must establish the facts upon which her demand is founded, by proof independent of any avowal of the husband. After she has recovered judgment against her husband his creditors may, *in loco debitoris*, if the judgment is prejudicial to their interest, assail the judgment collaterally. They are not concluded by the evidence upon which it was rendered. *Powells vs. Cook*, 28 An. 546.

If there is one opinion extending that principle to the irregularities of a judgment it has escaped our researches.

We mean by irregularity, at this point, mistake in the rendition or entry of a judgment, as when, for instance, no default had been previously entered.

Although the law, quite properly, seeks to shield the rights of creditors in matter of the separation of property between the husband and wife, it has never differenced the effect of the inactivity of the husband, when sued, from that of any other debtor when sued. Why should the wife's right in this respect, in the absence of a positive law, be less than the right of any other creditor? His inaction is not *in se* an error, in so far as relates to jurisdiction, or a wrong in so far as he is personally concerned.

There was nothing done or omitted in contravention of a prohibitory law in which the pain of nullity is provided for its infraction.

There was nothing done or omitted in contravention of a prohibitory law, silent as to possible resulting nullity.

There was nothing done or omitted in antagonism of law in a matter of public interest, or in a matter involving a question of good conscience.

In France the following principle is controlling: "Aucun exploit ou acte de procedure ne pourra être déclaré nul si la nullité n'en est pas formellement prononcé par la loi." *Bouvier, Code de Procedure*, p. 61.

It is true that framers of our Code have not adopted the method of the Napoleon Code on this subject, but chose in lieu the principles of the fathers of the civil law as set forth in their maxims; under which it has been held that acts in contravention of law, when in a matter of public interest, are null. In a matter of private interest, antagonism between the law and the act is not in itself an absolute nullity. It is necessary in public interest that the court should have had jurisdiction of the person and the subject matter. Defects of

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form, where there is no fraud or ill practice, is not cause sufficient to pronounce a judgment absolutely void, procured before a court of competent jurisdiction.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby annulled, avoided and reversed.

It is decreed that this case be and it is reinstated; that it be remanded to the lower court, to be proceeded with as the law provides, the plaintiff and appellee to pay costs of appeal.

No. 12,414.

MALVINA KONRAD VS. UNION CASUALTY AND SURETY CO., OF
ST. LOUIS, MO.

The action was brought upon a policy of accident insurance.

Notice of Death.—Plaintiff, under the circumstances of the case, gave notice of death sufficiently in time.

Proof of Cause of Death.—The policy did *not* require as a condition precedent to recovery by the beneficiary, proof positive and direct of the cause of death, as is required in some casualty and surety companies. Proof not conclusive that death was result of natural causes or design.

There was enough to prove: death was the result of accident rather than natural causes or design.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Rogers & Dodds for Plaintiff, Appellee:

Cited: *Kentzler vs. American Mutual Accident Association*, 60 N. W. 1002; *Anoka Lumber Co. vs. Fidelity and Casualty Co.*, 65 N. W. 354; *Leman vs. Manhattan Life Ins. Co.*, 46 An. 1189; *May on Insurance*, Vol. 1, par. 325; *Malory vs. Travellers Ins. Co.*, 47 N. Y. 410; 7 An. Rep. 410; 133 Ill. 556.

Howe, Spencer & Cooke for Defendant, Appellant:

Cited: *Sherwood vs. Ins. Co.*, 10 Hun. (N. Y.) 598; *Railway Ass. Co. vs. Burwell*, 44 Ind. 464; 127 U. S. 661; *Merritt vs. Preferred Accident Ins. Co.*, 98 Mich. 388; *Tennant vs. Travellers Ins. Co.*, 81 Fed. Rep., p. 322.

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Argued and submitted March. 18, 1897.

Opinion handed down March 29, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

BREAUX, J. Plaintiff, beneficiary of a policy of accident insurance, brought this action to recover the amount of the policy.

The grounds of defence are three:

First—No notice of death was served within the time contemplated by the policy.

Second—A special and general denial that the death of the assured was caused by any accident covered by the policy.

Third—That the assured committed suicide.

The policy was issued in October, 1895. It covered bodily injuries sustained through external violent and accidental means, and stipulated that if death resulted within ninety days from such injuries, independently of all other causes, the company would pay the amount of the policy to plaintiff, who was his sister. The insured and insurer agreed that immediate, written notice would be given to the general agency issuing the policy or to the company at St. Louis, Missouri, on blanks provided for the purpose, of any accident and injury for which a claim is to be made, with full particulars; that affirmative proof of death or loss of limbs, or of sight, or of duration of disability would be furnished to the company within two months from time of death, or of loss of limb, or of sight, or of termination of disability.

The insured, Edward B. Konrad, left West End on the morning of the 24th of February, 1896, in a skiff. A sailor from the shore of the basin pleasantly remarked to the young man, who was leisurely and awkwardly pulling the boat to the lake, "that he was not much of a hand" at rowing a boat. To this he made some answer, and began to pull as one accustomed to rowing. He said something about the weather, and asked where the best fishing banks were, and went out of the basin and turned westward into the lake.

About half past 9 of the day before mentioned, another witness saw a young man in his shirt sleeves, his hat off, rowing toward West End. "He was pulling a good ordinary stroke," said the witness. He was about two miles from the main shore. It had been

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quite foggy during the early morning. It was clearing off when witness passed him. Subsequently, during the forenoon of the day, a trapper, on his return from his usual daily work, saw a skiff on the lake, about a mile from West End. The young man's coat and hat were in the skiff, and a small can of bait. When the skiff was found no one believed among the fishermen at the lake that the young man was drowned; it was thought that he had gotten out of his boat and had gone ashore; no search was made for him on that day. About fifteen days afterward his body was found floating in the lake, about four miles from West End.

The evidence does not indicate that prior to the date of his death the assured had suicidal intent.

The certificate of the coroner stated that drowning was the cause of death. The plaintiff forwarded her affidavit to the defendant company, stating that she was not aware until April 20, 1896, that the deceased held a policy in the defendant company.

In answer to plaintiff's demand of payment, the agent wrote to the plaintiff informing her that on account of delay in giving notice of death the company disclaimed liability; in other words, that the delay was in violation of the policy contract.

The District Court gave judgment in favor of the plaintiff.

The defendant took a suspensive appeal.

The first ground of defence is that immediate notice of death was a condition precedent to recovery and that it was no excuse in this respect that the beneficiary was not aware of the policy.

The verity of plaintiff's affidavit, in which she declared that she did not know of the policy in her favor, and that she only found it the day prior to the date of notice, is not questioned.

The principles governing fire insurance companies in the matter of the nullity of the contract of insurance, the forfeiture of the policy and conditions precedent to a recovery upon a policy apply as well to a contract of insurance against accident; except if there is some modification or change in the stipulations.

The time of notice is specified in fire insurance policies. The language of the condition usually reads, as in the case of life or accident policies "immediate notice to be given." The weight of the decisions, as we have read them, does not, under all circumstances, require immediate notice as a precedent condition. The words "immediate" and "forthwith," "as soon as possible" used in

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policies are not always taken literally. It will meet the requirement, says May, in his work on Insurance, Sec. 462, "if given with due diligence under the circumstances of the case and without unnecessary and unreasonable delay." "To give the word a literal interpretation would in most cases strip the insured of all hope of indemnity and policies of insurance would become engines of fraud."

We are informed by this text writer that notice within eight days after the fire, and within five days after it came to the knowledge of the insured has been held reasonable. In another case that notice was reasonable where the fire happened on the tenth and notice of loss, dated the eleventh, reached the insurance office on the fifteenth.

But that a delay of four months in one case; of eleven days in another, there being no sufficient excuse therefor, has been held to be unreasonable. To decide that one was not fully diligent and that she lost her right as a beneficiary, because she did not give notice of a policy of which she knew nothing, would be more strict and exigent than, in our opinion, the language of the policy required. There was timely notice given after the fact of insurance came to the knowledge of the plaintiff. The delay in finding the policy was not strange and unexplainable. On the contrary, it appears to have been entirely consistent with good faith.

The case of the Provident Life Insurance Company vs. Baum, 29 Indiana Rep., pp. 236-241, was an action on an accident insurance policy. The court said in answer to the complaint that notice was not given in time, that the law, as stated in Angell on Fire and Life Insurance, is that "there must be no unnecessary delay, nothing which the law calls laches."

Applying the interpretation to the contract in case of notice to the underwriters of a loss by fire, the court held that the terms "forthwith" and "as soon as possible" in the policy of insurance, after the accident, are not to be taken in a severe literal sense, but mean with due diligence or without unnecessary procrastination or delay.

We pass to the next objection urged by the defendant that the plaintiff can not recover except upon some affirmative proof that the death of Edward B. Konrad was caused by an accident insured against and covered by the policy—that is, by external, violent and accidental means, of which, the defendant contends, the record contains no proof.

This ground of defence rendered it necessary to carefully consider

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the conditions of the agreements endorsed on the reverse of the policy. It devolved upon the insured, in case of accident not resulting in death, to furnish affirmative proof of loss of limb or of sight. In case of death it was incumbent upon the beneficiary to furnish affirmative proof of death, but direct and positive proof that death or personal injury was caused by external violence and accidental means was not one of the conditions. This question was left to a decision under the rules of evidence. The necessity of giving notice of death does not include notice of the cause of death, nor does the necessity of proving death affirmatively cover affirmative proof of the causes of death. The insurance, it is true, was against bodily injuries sustained through external, violent and accidental means. These may be considered established, although a plaintiff may not have furnished direct and positive proof of the facts as required by some of the policies issued by some casualty and surety companies. If it be manifest that death was neither occasioned by natural causes nor by the deceased himself, it at once becomes evident that the "violent and accidental" must be considered as cause.

We are brought to the defence that the assured committed suicide and that death by suicide was expected from the risk covered by the policy.

Death by accident is defined an unexpected event not according to the usual course of things; applying this definition it has been held that where a person is drowned while bathing it is accidental death, although no proof is offered of the circumstances.

Trew vs. Railway Passenger Association, 6 Hurlstone & Norman, 339. Also where the insured fell in a fit in shallow water and was drowned it was held to be a death by external and material causes.

In the case in hand there is no direct proof of the cause of death. The indications are that the insured was drowned.

Without more proof it would be difficult to conclude that he deliberately destroyed himself. The natural presumption arising from the love of life of itself negatives all idea of suicide. The one destroying himself is guilty of a moral crime with which his memory should not be made to suffer, unless proof is evident.

We conclude that the evidence does not sustain the defence that he committed suicide.

In the second place that he did not die a natural death.

The good health of the assured and the circumstances preceding

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the death do not tend to establish the theory that death resulted from natural causes.

It may be logically inferred, indeed it must be inferred, as it was not a natural death, or a suicide, that the death was caused by external violence and accidental means. There was enough to prove that death was the result of accident rather than design or natural causes.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,395.

CITIZENS AND TAXPAYERS OF NATCHITOCHES PARISH VS. THE BOARD OF SUPERVISORS OF THE PARISH OF NATCHITOCHES.

A Question of Law.—The construction of Sec. 1211 of the Revised Statutes, as amended by Art. 76 of 1884, was involved.

Election.—Local option is not limited to parish action. The election held in cities and towns under police jury ordinances has the same effect as relates to the cities and towns as if it had been held by authority of the cities and towns. As in the latter case, the cities or towns would have the right to order another election to decide as to local option at the end of the year; they, the cities and towns, have the same authority if the election has been held within their respective limits by the police jury.

A PPEAL from the Tenth Judicial District Court for the Parish of Natchitoches. *Cullom, Jr., J.*

Pierson & Porter and *Scarborough & Carver* for Plaintiffs, Appellants.

Phanor Breazeale, District Attorney, and *Thos. P. Chaplin*, City Attorney, for Defendants, Appellees.

Argued and submitted February 16, 1896.

Opinion handed down March 1, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

BREAUX, J. The facts of this case are, that an election was held in

49	641
105	438
105	514
49	641
107	207

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the parish of Natchitoches, which resulted against the issue of licenses for the sale of intoxicating liquors, and the police jury passed ordinances prohibiting the sale of liquors. The election thus carried was ordered in 1895.

The police jury subsequently passed an ordinance calling a special election in the city of Natchitoches and in Ward 4 of the parish, to decide whether intoxicating liquors should be sold within the limits of the city and ward after January 1, 1897. The plaintiffs assailed the right of the police jury to enact ordinances calling a special election in the city of Natchitoches and in Ward 4 of the parish.

The question is one of law, and involved the construction of Sec. 1211 of the Revised Statutes as amended by Act 76 of 1884.

The plaintiffs contend that it is not within the power of a ward or city to repeal a law prohibiting the sale of intoxicating liquors in the parish, which was adopted by the voters of the entire parish.

We have found it impossible, after having given our best attention to the subject, to come to the conclusion that parish action decides the matter so that the question can not be submitted to the other political subdivisions mentioned in the statute in so far as they are concerned.

The local option, or ordinance against the sale of liquors, of the parish, in our judgment, may be repealed within the limits of such subdivisions in the manner provided by statute.

By the act of 1884, No. 76, an election against the sale of intoxicating liquors is binding on the towns and wards.

If an election had been ordered in the ward and city, no other election could have been held during one year.

An election was held in the whole parish, by order of the police jury. The town and ward were bound during the year, but not thereafter. The *proviso* of the statute which reads: "Parish action shall govern the action of any ward, incorporated town and city within the limits of said ward or parish, as the case may be, as fully and completely as if said election had been held by authority of said town or city," must control.

For reasons assigned in the case of Police Jury of De Soto Parish vs. Town of Mansfield, No. 12,394, the judgment appealed from in this case is affirmed.

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No. 12,391.

MRS. CLAUDIA PEARCE, WIFE OF, ET ALS. VS. STATE OF LOUISIANA
EX REL. P. BREAZEALE, DISTRICT ATTORNEY, M. J. FOSTER,
GOVERNOR, AND THE SHERIFF.

49	643
106	645
49	645
110	582
49	643
113	411
49	643
119	74
120	276

Motion to Dismiss.—There is no difference, in so far as relates to the action of the judge granting the appeal, between an order fixing a return with date therein inserted, and a petition to him presented with an order appended fixing the return on a day fixed. In either case it is the judge who named the day, and if he commits an error, the appellant, who has sought no undue advantage, can not be prejudiced by the judge's act.

Locus Standi.—The State has the right and power to stand in judgment against a defaulting tax collector for levee taxes.

Judgment Confessed is Valid.—The tax collector and his sureties can confess a valid judgment recognizing the existence of a mortgage on the immovable property of the former.

Scope of Mortgage Resulting from Bond.—The mortgage confessed covers the amount of State and parish taxes that are delinquent and the amount of levee taxes that are delinquent.

Bond in Favor of All Persons Interested for Taxes Collected.—The tax collector's bond, which gave rise to the mortgage is conditioned for the faithful performance of the tax collector in the collection of and accounting for State and parish taxes and the levee tax. The language of the statute is that the bond shall operate as a mortgage in favor of the State, parish and all persons interested in matter, the court holds, of amounts collected as taxes.

Liability of Vendees of Property Mortgaged.—As there existed a mortgage on the property, those who bought the property are in a position similar to that of their vendor, as relates to the mortgage.

Bond Covers Duties Contemplated When it Was Signed.—The bond covers the duties imposed before it was signed and may cover duties imposed since it was signed, provided they were within the scope of the contract.

Effect of Pact de non Alienando.—The clause *de non Alienando*, dates from the date of the registration of the bond. Art. 354, R. S., provides a date from which it shall exist, but does not limit the effect to the one day upon which the bond was registered.

Damages Not Allowed.—The appellant has admitted an error and ordered a re-advertisement of the property for sale. The state of the facts at the time the injunction issued must control. Appellant's prayer for damages is rejected.

A PPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. Cullom, Jr., J.

J. C. Cappel and Wm. H. Peterman for Plaintiffs, Appellees.

M. J. Cunningham, Attorney General and Phanor Breazeale, District Attorney (A. V. Coco, of Counsel), for Defendants, Appellants.

Pearce et als. vs. State ex rel. District Attorney et als.

Argued and submitted February 17, 1898.

Opinion handed down March 1, 1897.

Rehearing refused April 12, 1897.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

BREAUX, J. The appellees filed a motion to dismiss the appeal.

They allege as facts upon which the motion is founded that the record shows that judgment was entered in chambers on December 30, 1896. On the same day the appellant filed a petition for an appeal and prayed "that a suspensive and devolutive appeal be granted from the judgment rendered in said above cause, returnable on the second Tuesday of January next, the twelfth day of said month." The order of appeal, in conformity with the appellant's prayer, made the cause returnable on the second Tuesday of January, 1897, the twelfth day of the month.

The return day was not the second Tuesday but the second Monday of January. There was an error committed.

Whether it is good ground to dismiss the appeal is the question for our determination.

The act of the Legislature of 1839, relative to appeals, provides: "That hereafter no appeal to the Supreme Court shall be dismissed, on account of any defect, error, or irregularity in the petition or order of appeal, or in the certificate of the clerk or judge, or in the citation of appeal or service thereof or because the appeal was not made returnable at the next term of the Supreme Court, whenever it shall not appear that such defect, error or irregularity is imputed to the appellant; but in all such cases the court shall grant a reasonable time to correct such errors or irregularities (in case they are not waived by the appellee) and may impose on the appellants such terms and conditions as in their discretion they may deem necessary for the attainment of justice; and may impose such fine on the officer who shall have caused such irregularities as they may deem proportionate to the offence."

It is here argued by the appellees that the error was attributable to the fault of the appellant or his counsel. In *Trimble vs. Brichta*, 10 An. 779, cited by the appellees in support of their motion to dismiss, the motion for an appeal was made verbally and the court

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said that as it was the duty of the judge in granting the appeal to fix the return day in accordance with the law and rights of the appellees, and as there was nothing in the record to show that the appellant suggested any particular return day the order of appeal was considered as the act of the judge and the appeal was not dismissed.

In *Citizens Bank vs. Rutty*, 26 An. 747, the court said: In this case the appeal was made in writing and the time fixed for the return thereof by the judge was the day asked for by the appellants. If they erred the error is their own.

A similar question arose on a motion to dismiss in the case of *Chaffe & Sons vs. Heyner*, 31 An. 574, in which the court held that where an application for appeal was made in open court, and the time for the return day made by the judge was in compliance with the motion of appellant's attorney, it was none the less the act of the court and not the act of the attorney. While in this case the court did not overrule the 26 An. case *ubi supra*, it withheld its approval and used the following language with reference to the decision: "Perhaps we should not have ruled as the court then did."

In *Wooton vs. LeBlanc*, 32 An. 692, the court reached the conclusion that the error was attributable to the appellant, and dismissed the appeal.

In *State vs. Dollwood*, 33 An. 1229, in matter of a similar error, it was held that it was the error of the judge.

There is a diversity of views expressed in the different decisions upon the subject. There were dissents, which necessarily lessen the certainty of decisions as authority. Under the circumstances we feel at liberty to consider the question as *res nova*. The judge in signing the order was exercising one of the judicial functions with which he is entrusted. It is the judge who fixes the date. It was his act and not the act of the counsel by whom the motion was made for an appeal. We can not take it for granted that he was misled by counsel, and that he intended to issue another order and fix another date different from the date fixed.

Whatever antagonism there may be between the law and the act. It is the act of the judge. The error committed is his error, until it conclusively appears that it was caused by the appellant. The order of appeal is one removed from the appellant. The order was that of

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the judge, uninfluenced, in so far as we know, by the petition, or the order which was presented to him for his signature. There is, in our view, substantially no difference between a motion with an order fixing the return day and a petition with an order fixing a return day. In each, on the face of the papers, *non constat* that it is not the order of the judge or that he was misled.

The motion to dismiss is therefore overruled.

STATEMENT OF FACTS.

Plaintiffs seek by an injunction directed against the execution of a writ of *fi. fa.* issued upon a judgment obtained by the State of Louisiana against Clifton Cannon, formerly sheriff and tax collector of the parish of Avoyelles, to restrain the execution of the judgment.

We are informed by the record that the State, by confession of Cannon and the sureties on his bond, procured a judgment against them, with recognition of a mortgage on property described in the petition filed for the State, which included the plantation seized under the judgment enjoined; the judgment confessed rejected all pleas and right of discussion.

Cannon, it appears, qualified as sheriff on the 23d of June, 1892, by furnishing bond as required, which was duly recorded. One of the bonds was dated and placed of record June 23, 1892; the other, March 10, 1893. It was upon these bonds that suit was brought and judgment obtained.

Plaintiffs inherited the property seized from their mother, Mrs. Mary E. Bennett, wife of S. S. Pearce, Sr., who had purchased it from Cannon on April 13, 1893.

The following are the grounds upon which is based the right for an injunction:

1. That the State was without right or power to sue a delinquent tax collector for levee taxes. And, in the alternative, should the court hold that the State can properly sue to recover levee taxes, and that the defaulting tax collector and his sureties can confess a judgment which recognizes the existence of a mortgage on the lands of the appellees, plaintiffs contend that the effect of the mortgage must be limited to the amount of the State taxes that are delinquent and not extended to cover delinquent levee taxes; for the reason that the tax collector's bond, which alone gives rise to the mortgage, is conditioned only for the faithful performance of his duty in the

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collection of and accounting for State and parish taxes; that the mortgage resulting from the recordation of the tax collector's bond covers alone his delinquencies in the matter of State and parish taxes, and can not be extended so as to include levee taxes.

In the second place, the plaintiffs urge as grounds for the injunction that if payments had been properly applied by the Auditor there would have been a reduction of the shortage on all accounts, licenses, State and levee taxes, and that as to the levee taxes, the judgment for their amount should have been personal as against Cannon and without mortgage effect.

Another ground of injunction denies the right of appellants to proceed against appellee's property by direct seizure.

Another ground is that the property was advertised to be sold under the writ of *fi. fa.* on the fourth Saturday, the 20th of June, and that there is no such day in the calendar, and lastly, that the judgment enjoined is, so far as these appellees are concerned, an absolute nullity, because it decrees mortgage rights against the property of the appellees upon the confession of persons who are strangers to the title, in a proceeding in which the appellees were not made parties.

The injunction was maintained in the District Court. The State prosecutes this appeal. It is correctly alleged by plaintiffs that the amount of the levee taxes collected by Cannon, sheriff, and not paid over by him was four thousand nine hundred and ninety-one dollars and thirty-seven cents, and that this amount was included in the judgment which the State obtained against him on the petition in the suit in which Cannon and his sureties confessed judgment—*i. e.*, the judgment enjoined in the case before us.

ON THE MERITS.

We take up the first ground before us for our determination: the power *vel non* of the State to sue for and recover moneys collected by the sheriff for account of the levee district.

If we should grant all that is claimed by plaintiffs on the ground just stated, the judgment obtained would be a nullity only to the extent that the amount of the levee taxes was collected and not paid over by the sheriff. The judgment would remain valid for the State and parish taxes. The entire judgment would not be null. A judgment may be annulled in part and in part maintained. The con-

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sideration of the judgment does not appear to have been disputed in the lower court. But even as to the levee taxes the judgment is not a nullity on the ground urged.

It can not be denied that the statutes secured to the Red River, Atchafalaya and Bayou Boeuf Levee District the right to sue in all matters affecting the interests of the board. Section 3 provides that the board shall have the power to sue and shall be sued in its corporate name, but it does not follow that all suits in any manner affecting the rights or the revenues of the levee district must be brought by or against the Board of Levee Commissioners in the absence of all statutory declaration upon the subject.

The sheriff, under Sec. 9 of Act 79 of 1890, was in duty bound, whenever ordered by the Board of Commissioners, to collect the taxes levied on the tax rolls furnished him for the purpose at the same time and in the same manner as was prescribed for the collection of State and parish taxes; and he was bound to account to the State Treasurer for the collection; in other words, the sheriff is responsible to the State Treasurer for the levee taxes collected. That officer is made the keeper of the fund and the sheriff is required to settle with the Auditor for this tax as he is required to settle for the other taxes he collects.

It does not by the language of the statutes appear to have been contemplated by the legislator that the board would institute suits against defaulting sheriffs and compel them to settle and pay over to it the taxes collected and that the board would at some period of time not stated pay over to the treasurer. On the contrary, these taxes were placed on the same footing as any other tax; to be collected, accounted for, and subsequently paid out by the State Treasurer. The Levee Board was not in any manner made the custodian of the levee fund. By the language of the statutes the bondholders and other creditors are to look to the State Treasurer for payment—that is, all warrants are to be drawn on this officer and to the extent of the funds received the State is placed in a fiduciary position. Sec. 20 of the Act of 1892 provided that all funds collected for the board shall be transferred to the credit of the district by the State Treasurer and the officers shall proceed to collect the taxes.

In addition, it is manifest that the amount was, in every respect, a tax. It must as such fall within the control of the section of the Revised Statutes which provides that the Auditor shall direct pros-

ecutions in the name of the State for all official delinquencies in relation to the assessment, collection and payment of the revenue. With reference to the provisions of Sec. 17 of the same act of 1890, we find it impossible to agree with counsel. *Mandamus* was not the remedy. The Board of Levee Commissioners may appeal to the courts; the amounts collected would have to be paid in to the treasurer; the process (*Mandamus*) would only be ancillary to the State's authority and can not in a case such as the one at bar be the remedy. Moreover, the defendant sheriff and his sureties having confessed judgment, they have admitted the authority of the plaintiff in the case to stand in judgment.

This brings us to the next question involved here: that the mortgage resulting from the tax collector's bond covers his delinquencies in the matter of State and parish taxes, and can not be extended so as to include levee taxes.

Considered as an original question the sheriff and his sureties on the bond are responsible for all taxes collected by him. As to the mortgage which results from the recorded bond the statute provides that the "bonds" when so registered shall operate from and after the date of registry, as a mortgage on all real estate of the principal obligors therein, in favor of the State, parish and all persons interested." (Italics ours.)

This includes, in our judgment amount of the taxes assessed under State authority; collected by the sheriff as taxes which he has failed, after collection, to pay to the State Treasurer; to be placed by that officer to the credit of the levee board of the district.

The conditions of the sheriff's bond as tax collector are that he shall perform all the duties incumbent upon him as tax collector; this includes surely an accounting for all taxes collected. The performance of the principal's duties as collector of taxes is secured by the mortgage which has been recognized in the judgment confessed and by which unquestionably the tax collector is bound.

The plaintiffs consider that this position is correct in so far as the judgment confessed affects the right of those who confessed judgment and make no complaint personal to them; but they urge that confession resulting in a judgment recognizing a mortgage upon their property can not operate to their prejudice; that they have a standing to defeat it if they can.

In answer to this complaint, we think it is sufficient to say that, as

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we have already reached the conclusion that there existed a mortgage on the property after the tax collector had qualified and his bond had been recorded, those who bought the property are in no better position than the vendor was at the date of the sale. They purchased from the tax collector after his bond had been recorded and after the levee district had been created by statute. A valid mortgage against the tax collector was a valid mortgage against them as his vendees,

We pass to the next objection urged: that the levee district was not in existence when the conditions of the tax collector's bond were defined by law; and that those conditions can not be enlarged so as to include a liability arising under a subsequent statute. We can not overlook the fact, in deciding this point, that the sheriff's bond was recorded subsequent to the creation of the board, and that its conditions included the duty of collecting the levee taxes. The Constitution directed the Legislature to maintain a levee system and to that end to levy taxes. The duty of collecting those taxes in the parish for which he was sheriff, devolved upon him at the date the bond was recorded. He acted under it and received the taxes. The plaintiff, despite the State's mortgage, chose to buy the property.

A similar question was decided in *McGuire vs. Bry*, 3 An. 196. As the *syllabus* covers the point decided, we extract from it: "The sureties on a bond given by a sheriff for the collection of the parish taxes can not, when sued as sureties for a portion of the taxes collected, but not paid over by the sheriff, contest the legality of the police jury making the assessment. By receiving tax roll and executing bond, the sheriff and his sureties recognized the authority of the police jury.

"It is too late to contest the validity of their ordinances after having acted upon them and collected the taxes."

This principle was affirmed in *Police Jury vs. Brookshier*, 81 An. 786.

If the sureties can not contest the legality of the tax collected which their principal has in his possession, it follows that purchasers of property from the tax collector can not set up the defence that the principal, their vendor, never legally contracted to collect the taxes which he has collected.

Here, before the execution of the official bond of the sheriff, the duties under the statutes had been imposed. If an individual had

furnished such a bond and mortgage for the faithful performance of a duty he certainly would be held bound by the conditions expressed in the bond, and his mortgage would be valid, as no alteration has been made since it was given.

The Legislature has the power to change the duty of the officers, and those who subsequently enter upon obligation upon bonds required or purchase property affected by a mortgage under the bond can not claim or contest the validity of the mortgage on the grounds here urged.

It has been held by a number of courts of this Union that the Legislature has power at any and all times to change the duties of officers, and that it is in effect as though the power was recited in the bond, provided they were within the scope of the contract as originally contemplated by the parties. This covers duties subsequent to the date of the bond as well as those preceding that date. Am. and Eng. Ency. of Law, Vol. 24, p. 882.

Here the case is much stronger for the appellants than the one to which we refer, for the duties were imposed to collect the tax before the bond was signed.

The question of credit given by the Auditor is before us for our determination. The complaint is that the Auditor credited payment made in reduction of the defalcation to the levee fund; that the whole tax collected during stated months was applied by that officer to the credit of the levee fund. This, it appears, was done by request of the tax collector. Having already determined that the collection by the tax collector of the levee tax gave effect as a mortgage to his bond to the extent of the amount collected, it would serve no purpose to pass upon this question. The officer was bound for all the taxes collected, and his bond operated as a mortgage to secure the payment of all taxes collected by him.

Another objection insisted upon by the plaintiffs, is the direct seizure made of the property owned by them; in other words, it is urged that the plaintiffs should have proceeded by hypothecary action and not by direct seizure, as (they assert) the property at the time of seizure was in the hands of third parties. It is a fact as stated by the plaintiffs, that Cannon, sheriff, became the purchaser of the property in controversy after his bond had been recorded; and that a few days subsequent it was sold to Mrs. Mary Pearce, and that upon her death it descended to the appellees, her heirs. The point here is

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grounded by the appellee on the fact clearly stated that the lands which had been seized did not belong to Cannon, the principal obligor at the date of the registry of his official bond. That he did not acquire title to the land until after the registry, and that therefore Sec. 354 of the Revised Statutes did not apply, as it limits the pact *de non alienando* to mortgages on lands which may have belonged to the principal obligor at the date of the registry of his official bond.

In our judgment, the section does not limit the fact to the extent urged by the appellees.

The right to the pact dates from the registry of the bond, but is not limited to that date alone in our view. This court said in *School Board vs. Cousin*, 31 An. 298: "For the security of these bonds the law has seen proper as it were to write on them a sweeping clause *de non alienando*, as provided in 354, R. S."

We think that it is, as it were, a maximum as to remedy which includes a *minimum*; covering all property bought and sold, after registry, as well as all property of the sheriff at the time of the registry.

The pact *de non alienando* is not statutory save in this statute here. It owes its existence to jurisprudence. It has been recognized, as is well known, in a number of decisions.

Interpreting the statute here this court has said that it was as if it had been written in the bond. Case cited *ubi supra*.

In another case, *Fluker vs. Bobo*, 11 An. 609, with reference to the State here, the court held, "that it was intended to give to the registry of the bond (*as to the property sold after its registry*) the same effect as that conferred in acts of sale by the clause of *non-alienation* (*italics ours*), thus including all property on which there is a mortgage by the registry of the bond.

The last of appellee's grounds is that the property was advertised to be sold under a *fi. fa.* "on the fourth Saturday, the 20th of June, and that there is no such day in the calendar."

The appellants here, in effect, admitted the error, and it appears that a re-advertisement was ordered.

It appears of record that the admission of error was made after the injunction had been issued. The state of the facts at the time the writ of injunction issued must be considered, and not facts subsequently happening.

The applicants claim damages for the reason that plaintiffs' action

presents a case of an aggravated abuse of the equitable writ of injunction.

We do not think that damages should be allowed. The writ was not absolutely without any ground. The plaintiffs in the writ have withdrawn the sale of the property included in the erroneous advertisement and have ordered a re-advertisement since the injunction was issued.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed.

It is further ordered, adjudged and decreed that plaintiffs' injunction be dissolved and all their demands rejected, save the one that the property be not sold before the date of sale is advertised as required—that is, be not sold as it was at first advertised, "on the 20th day of June."

The appellees pay costs of appeal.

No. 12,881.

PERKINS BROS. ET ALS. VS. FERDINAND GUMBEL, LIQUIDATOR, AND
THE SHERIFF.

49 653
52 972

The articles of the Code relative to the payment with subrogation have no reference to the purchase of promissory notes secured by mortgage. C. C., Arts, 2160, 2161; 9 Rob. 476; 18 An. 273.

The sale of the note secured by mortgage and privilege carries as accessories the privilege and mortgage. C. C., Art. 2615, and 2 La. 576; 18 An. 273.

A PPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Lafargue, J. ad hoc.*

J. C. Cappel, Joffrion & Joffrion for Plaintiffs, Appellees.

G. H. Couvillon and Saunders, Miller, Smith & Hirsch for F. Gumbel, Liquidator, Defendant, Appellant.

Argued and submitted February 17, 1897.

Opinion handed down March 29, 1897.

Perkins Bros. et als. vs. Liquidator and Sheriff.

The opinion of the court was delivered by

MILLER, J. This case was before us on a previous occasion, and was remanded to enable the plaintiff to offer testimony in reference to one of the notes on which he sued. *Coco vs. Gumbel*, 47 An. 966.

There is a motion to dismiss the appeal, on the ground that the decree remanding the case restricting the issue to one of the notes for one thousand and eighty dollars, the amount involved on this appeal, is insufficient to give this court jurisdiction. But the contest of the plaintiff in the lower court is with other creditors of the defendant for payment from a fund exceeding two thousand dollars, derived from the sale on execution of his property, and the amount of the fund gives this court jurisdiction. Constitution, Art. 81.

The plaintiff, F. Gumbel, liquidator, sues on three notes, made by R. Coco, for ten hundred and eighty dollars each, maturing 1st of January, 1889, 1890 and 1891, to secure the payment of which there was the vendor's lien and special mortgage. Plaintiff claims to have acquired the notes by purchase from the original holder. Subsequently, the property became subject to other mortgages, and when the plaintiff sold the property under his judgment and execution, his right to the fund was disputed by the oppositions of the other creditors, on the ground that the notes had been paid, and thereby the plaintiff's mortgage and vendor's lien had been extinguished. Our previous judgment, on grounds unnecessary to be stated, freed the controversy from the objection that the third opposition claiming the proceeds was inconsistent with the denial of any mortgage. Our decree recognized plaintiff's mortgage and privilege for the note maturing in 1891, and as the testimony produced by the opponent tended to show payment, and the note maturing in 1890 had on its back "Received January 3, 1890, from Gumbel Bros. & Meyer, without recourse," signed by the agents of the original holder, we, at first, giving effect, as we thought, to the testimony, aided by the writing on the back of the note, held that note was paid. On the rehearing we remanded the case for proof as to plaintiff's demand on this note, maturing in 1890. The case comes back to us with additional testimony on the point at issue.

The only testimony offered to establish the payment alleged by the

opponents is that of the maker of the notes. He testifies that he requested plaintiff to pay one of the notes, maturing January, 1889, given with the three notes sued upon to his vendor, and it is shown this note maturing in 1888 was paid. Along with the testimony of the witness that the notes sued upon were paid, is his answer in effect to the question of the source of his knowledge, that they were paid unless "different from the first note." It is plain his statement of the payment of the notes sued upon is simply his inference based on the payment by plaintiff of the first note. The witness very frankly states he has no knowledge on the subject other than that he states.

The opponents, however, insist that the transaction which plaintiff claims to have acquired was a payment. By this is meant that the plaintiff firm paid the money for the notes to the agents of the original holders. But the question is whether the money was not paid for the purchase of the notes, as plaintiff maintains. The opponents rely on the articles of the Code that require a subrogation to the creditor's mortgage when he receives payment from a third person, and on the line of decisions following the Code, that such payment, without subrogation, extinguishes the mortgage. Civil Code Arts. 2160, 2161; *Nicholls vs. His Creditors*, 9 Rob. 476; *Washburn vs. Green*, 18 An. 332. The articles of the Code, with reference to payment and subrogation, have no reference to the purchase of notes or other incorporeal rights. The sale of the note carries the mortgage and privilege securing it. C. C., Art. 2615; *Moore vs. Lonailier*, 2 La. 576; *Oakey & Hawkins vs. Sheriff*, 18 An. 273. The plaintiffs do not claim title by payment and subrogation. They allege title by purchase. On that issue we have the writing on the back of the note, "Received from Gumbel Bros. & Mayer" put on it by the holder when he delivered it to the plaintiff. It is consistent with the purchase, or, at least not inconsistent with it. In the light of the testimony it is to be viewed as an acknowledgment of the money received from plaintiff. We have, too, the testimony of the original holder of his impression the notes were purchased, naturally not very distinct, with reference to a transaction years ago conducted for him by an agent. We have the accounts of plaintiff's factors of the maker, in which the notes are not charged to him, the natural course if they had been paid. The agents of the original holder from whom the notes were received are dead, but there is the positive testimony of the plaintiffs that the notes were purchased and not

 Miranda vs. Burg.

paid, the presumption too arising from the presentation of the notes by plaintiff. 3d Randolph on Commercial Paper, Sec. 1438. In our opinion the plaintiff has supported his title to the note the subject for examination under the previous decree.

We are asked to treat our decree, remanding the case as to one only of the notes in controversy, as an error. The subject received our full consideration when the case was before us on the first appeal. On the testimony in the record we reached the conclusion our decree carried into effect. The decree must stand.

It is therefore ordered, adjudged and decreed that the judgment of the lower court appealed from be reversed and avoided, and it is now ordered, adjudged and decreed that the oppositions be and they are hereby dismissed, claiming to be paid by preference over Ferdinand Gumbel, liquidator, out of the fund derived from the property sold by the sheriff, subject to said Gumbel's mortgage to secure the two notes of one thousand and eighty dollars made by Coco held by said Gumbel, maturing January 1, 1890, and 1891, and it is now ordered, adjudged and decreed that the proceeds of said property be paid by preference over said opponents to said F. Gumbel, liquidator, to the full amount of said notes, interest and costs, including five per cent. attorney's fees.

MR. JUSTICE BREAUX dissents.

No. 12,844.

J. P. MIRANDONA VS. NICHOLAS BURG.

The specific performance of a contract will not be ordered when compensation can be made in damages. Nor will it be decreed when the contract requires the doing of an act solely within the volition of the obligor, such as the signing of a lease, or the appointing of an arbitrator, or the exercising of the option to purchase property.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Dinkelspiel & Hart and F. B. Thomas for Plaintiff, Appellee.

W. S. Benedict for Defendant, Appellant.

49	656
51	1192
49	656
117	282
49	656
125	534

Mirandona vs. Burg.

Argued and submitted February 18, 1897.

Opinion handed down March 1, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

MCENERY, J. The plaintiff and defendant entered into the following agreement:

“ NEW ORLEANS, January 13, 1896.

“ I hereby agree to sell Mr. J. P. Mirandona stock in grocery occupied by me at present, corner Claiborne and St. Anthony, at market value to be appraised by two appraisers, one to be selected by Mr. Mirandona and one by myself. Mr. Mirandona to deposit one hundred (\$100) dollars to bind sale. Place to be leased at sixty dollars per month; lease to extend for five years, with a privilege of a further lease of five years at same terms, and privilege to buy said property at any time during the lease at appraised value.

“ (Signed)

N. BURG.”

The plaintiff demands a specific performance of the same. In the lower court there was judgment decreeing a specific performance.

Article 1926, Civil Code, provides that the obligee is entitled either to damages or, in cases which permit it, to a specific performance of a contract to do or not to do.

Article 1927, C. C., says: Ordinarily the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, where the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts.

Article 1928, C. C., provides that anything which has been done in violation of a contract may be undone if the nature of the case will permit and things be restored to the situation in which they were before the act complained of was done, and the court may order this to be effected by its officers, or authorize the injured party to do it himself.

By reference to Sec. 11, Code Practice Art. 680 *et seq*: “ Of the execution of judgments,” it will be seen that the obligation entered into by the parties is not of that kind that can be enforced in the way of a decree of specific performance.

Baillie & Co. vs. Assurance Co.

The sheriff would not be able to deliver the specific object, the delivery of which was ordered.

The parties to the agreement have to select each an appraiser, and from the appraisal the price of the thing has to be fixed. Besides there is to be a lease contract entered into with the privilege of buying the leased premises.

There is in the decree appealed from that intrenching upon the personality of the obligor that is repellant to our system of jurisprudence.

In case of Laroussini vs. Werlein, 48 An. 13, we said: "The principle is appealing that in the matter of the discharge of obligations by the debtor personally, he can not be compelled to act against his will; that his liberty must be respected."

In all its phases this case comes directly under the rulings of the case referred to. We can not compel the defendant to appoint an appraiser, nor can we compel an acceptance of the price and ascertain the market value of the stock from such appraisal. The appraisers may not agree and we can not appoint an arbiter. We can not compel the signing of the rent notes, nor can we compel the enforcement of the option to purchase the property leased.

The case is one for damages, for the inexecution of an obligation. No decree of specific performance could be equivalent to the doing of the act required to be performed.

The judgment appealed from is annulled, avoided and reversed, and it is now ordered that plaintiff's suit be dismissed without prejudice to further judicial proceedings in asserting what rights he may have under the contract.

No. 12,351.

LEWIS BAILLIE & CO., LIMITED, IN LIQUIDATION, VS. WESTERN ASSURANCE COMPANY OF TORONTO.

The plaintiff sued for amount due on property destroyed by fire.

Appraisal Waived.—Having in the answer denied all liability, the defendant was without right to sustain the plea of want of appraisal as a condition precedent to filing suit, although the policy contained a stipulation relating to appraisal.

The Defendant's Denial of Liability was in Effect a Waiver.—If the defendant was not liable there was nothing to appraise. Moreover, there was no such demand made to at once proceed with an appraisal as the law contemplates should be made by one claiming an appraisal under the terms of a policy.

Baillie & Co. vs. Assurance Co.

Proof of Loss.—Acts do not give rise to a presumption of fraud if they could be accounted for on the basis of good faith and honesty.

Liquidators for Plaintiff.—The right of parties to represent a corporation not contested in the court of first instance can not be examined on appeal.

Evidence of Value.—From necessity the opinion of ordinary witnesses acquainted with the value of property is admitted, although they are not experts in matters of value.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Bell & Randolph, Wise & Herndon and Alexander & Blanchard for Plaintiffs, Appellees.

William Thompson for Defendant, Appellant.

Argued and submitted January 20, 1897.

Opinion handed down February 1, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

BREAUX, J. The defendant insured fixtures of the plaintiff, of a drug store, occupied by the latter.

The amount of the policy was twenty-five hundred dollars, less the three-fourth value clause.

The premises were destroyed by fire.

Plaintiff brought this suit for the amount of the policy.

The plaintiff alleged that the required notice was given and proof of loss prepared and forwarded to the defendant within sixty days from the date of the fire, and that more than sixty days had elapsed since the proof of loss had been delivered.

Further, the plaintiff alleged that it has complied with all obligations imposed by the contract and policy of insurance.

The defendant relies upon two grounds. The first is:

That no appraisement had been made in the manner specified in the policy.

The second is:

Incorrect and untrue statement of the assured.

It is also alleged in the answer that the loss did not amount to or exceed two thousand dollars. The fact is, that appraisers, in case of differences, were to determine the amount of loss by fire.

Baillie & Co. vs. Assurance Co.

The policy stipulates: The loss shall not "become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of loss herein required have been received by this company, including an award by appraisers, when appraisal has been required, and that no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after a full compliance by the insured with all the foregoing requirements."

As bearing upon the necessity of appointing appraisers as a condition precedent to the suit, we note the fact that the adjuster on the ground, offered nineteen hundred dollars, and some time after, again when present at Shreveport, he offered two thousand dollars, which the plaintiff declined to accept. The defendant, by the appraiser, made the offer without admitting that it was indebted for that much.

The plaintiff in due time forwarded the proof of loss.

The defendant acknowledged the receipt only a few days before the sixty days had elapsed from the date it had been received, and in its answer it objected to the proof of loss as incorrect and unsatisfactory; it required a schedule of articles covered by the policy. The defendant further demanded full compliance with the contract and exacted an appraisal. The letter expressly reserved, in conclusion, "all the rights under our policy and without waiver or admission of any description."

The schedule was forwarded in compliance with defendant's demand. The defendant in its pleadings does not admit the validity of the policy or its liability in any amount. In other words the issue was not limited to a question of amount of defendant's indebtedness.

On the contrary, in its answer the defendant denies all and singular the allegations contained in plaintiff's petition.

The facts as relate to the alleged untruthful statement are in the schedule furnished by the plaintiff to the defendant. There were included "one cash register, one hundred and twenty-five dollars; three trunks, forty-eight dollars, and five show-cases, estimated at two hundred dollars."

We are informed that the fire destroyed all the books of the assured, save the cash book and ledger of date subsequent to July, 1898.

In making the inventory of goods purchased originally, the data

Baillie & Co. vs. Assurance Co.

were, it appears, not entirely exact, owing to the loss of plaintiff's books. The facts needful in the premises, as we are led to infer, were all submitted to the adjuster before the plaintiff furnished its proof of loss. From a judgment condemning it to pay the amount of two thousand dollars, the defendant prosecutes this appeal.

The question of appraisement as a condition precedent *vel non*, to filing a suit for recovery on the policy is the first before us for our determination. The policy issued by the defendant contains the stipulation that notice of proof shall be furnished to it, preceded by an award of appraisers, "when appraisal has been required." Some time after the loss, and after its agents were at some considerable distance from the place of loss, the insurer by letter demanded an appraisement. There was no offer made by it to name one of the appraisers and to proceed to the appraisement. The clause of the policy appears to have been considered by the defendant company as a condition precedent, the performance of which was left entirely with the assured, who were to be left to themselves, without suggestion or offer of any kind from the assurer. In a similar case, upon this point, it was said: "But it can not be contended that in such a case as this an appraisal of the loss is an absolute *sine qua non* to the bringing of a suit, If it were, all that an insurance company would have to do in order to avoid payment of a loss against which it had insured its patron would be to refuse to name an appraiser, or otherwise arbitrarily prevent an appraisement." 62 Fed. Rep. 257.

A stipulation for an appraisement should have for its sole object the ascertainment of the amount of the loss. The stipulation ceases to have force where the insurer disputes to the insured the right to recover anything at all under the policy. We think the conclusion reasonable: in the presence of an absolute refusal to pay anything, the assured should have the right to file a suit and maintain an action for the loss. That a denial of all accountability leaves nothing to arbitrate. On the refusal of the defendant to pay, and in the presence of defendant's neglect actively to avail itself of the stipulation in regard to the appraisal, the plaintiff might well infer that nothing was left for him to do save to sue, and have any right he had passed upon by the courts. *Millandon vs. Insurance Co.*, 8 La. 557, 562. See also upon this point, *Hamilton vs. Liverpool and London and Globe Insurance Company*, 136 U. S. 242; *Hamilton vs. Home Insurance Company*, 137 U. S. 370; *Wood on Insurance*, 2d Vol. 1013; *Beach on Insurance*, 1st Vol., Sec. 200; 2d Vol. 1247.

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The defendant insisted that an untrue proof of loss had been furnished and that the untruthful statement had the effect of invalidating the policy.

The proposition that wilful swearing, with the view of deceiving the assurer, will defeat the right of recovery, does not admit of any question. It must be made evident, however, that the alleged false swearing was intentionally committed.

The burden of proving the truth of the allegations of fraud rests on the defendant. Fraud is never to be presumed from acts which may be accounted for on the basis of honesty and good faith. To avoid the policy it must appear that the intention was to defraud.

National Bank vs. Insurance Company, 95 U. S. 673; May on Insurance, Secs. 443, 447; Wood on Insurance, Secs. 451, 455; Balestracci vs. Ins. Co., 34 An. 344; Daul vs. Ins. Co., 35 An. 98; 2 Beach, Sec. 808.

With reference to the cash register, one of the articles not destroyed, the book-keeper testified that it was not in the building, and it was not destroyed by fire as it was being repaired at some distance from the store; it was brought back some time after the fire, which accounted for the oversight in his charging it on the schedule of articles of property destroyed by fire. As to the show-cases and two empty trunks we agree with the District Judge that the omission may have been the result of inadvertence, and is not gross enough to justify a presumption of fraud. After having considered all the evidence upon this point we have not found that there was wilful intention to gain an advantage by false swearing.

The defendant in the brief complains of the judgment, because no proof was made, it is insisted, of any right in W. A. Baillie to bring suit, either as liquidator or assignee, the policy having been issued to Lewis Baillie & Co.

The facts are that the suit was brought by Baillie, Ledbetter & McCraney, who alleged that they had been appointed and had qualified as liquidators of Lewis Baillie & Co., Limited, a corporation.

The pleadings did not deny that there was such a corporation. The general denial or the special demurrers did not put at issue the capacity of the liquidators. The right of parties to represent a corporation, not contested below, can not be examined on appeal. *Player vs. Tarkington*, 4 An. 396.

Lastly, the objection of defendant was to the evidence of a witness,

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admitted over objection, to testify as to the value of property; the objection was that his examination disclosed his unfamiliarity with values such as was involved in the case.

The witness was not examined as an expert. It has been held on authority and reason, that the opinions of ordinary witnesses acquainted with the value of property are often admitted from necessity, even though their knowledge is not the result of peculiar skill.

The judgment appealed from is affirmed.

No. 12,328.

SMITH BROS. & CO., LIMITED, AND GENTRY BROS. vs. W. J. ATHENS
LUMBER COMPANY, LIMITED.

Amending Judgment at instance of Appellee.—While it is true that appellees can not have a judgment amended *inter se*, a judgment may be amended between one of the appellees and the appellant, on the former's answer to the appeal, if the amendment does not affect the interest of his co-appellees.

General Privileges.—Although different properties are covered by two mortgages, in an insolvency the general privileges must be borne by the junior mortgage, if the proceeds of unencumbered property are not sufficient to satisfy the general privileges.

Clerk's Salary.—The claim for clerk's salary, prior to insolvency, not recorded, is not secured by privilege on the immovable property of the insolvent.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Henry P. Dart and Benjamin W. Kernan for Henry Wellman, Opponent, Appellee.

Harry H. Hall and N. R. Roberts for J. A. Fay & Co., Opponents, Appellees.

F. L. Richardson for New Orleans National Bank, Opponent, Appellee.

Mercer W. Patton for F. W. Bandy, Opponent, Appellee.

Argued and submitted on briefs April 2, 1897.

Opinion handed down April 12, 1897.

Smith Bros. & Co. et als. vs. Lumber Co.

The opinion of the court was delivered by

BREAUX, J. The liquidator of the W. J. Athens Lumber Company, Limited, filed an account of his administration.

Seven oppositions were tendered to the account. The questions raised were considered and passed upon and the account subsequently was approved in accordance with the views of the court *a qua* and a judgment rendered.

One of the opponents, Henry Wellman, appealed from the judgment of homologation. He was a mortgage creditor of the insolvent company; this mortgage was a junior mortgage. The decree ordered that the costs of administration be paid out of the proceeds of unencumbered property. The amount of the sales of unencumbered property was not large enough to pay the cost of administration. There remained unpaid, after supplying the amount as just stated, the sum of six hundred and seventy dollars and ninety-four cents, which balance the court ordered to be paid out of the proceeds of the mortgaged property, by preference over the mortgage creditors.

The appellant does not object to the ruling, but on the contrary admits that the amount, his proportion, is correctly charged.

In the account it is fixed at three hundred and forty-nine dollars and twenty-nine cents. The proportion of another creditor, the New Orleans National Bank, whose claim is secured by mortgage preceding the Wellman mortgage in rank, is three hundred and twenty-seven dollars and fifty-one cents.

The last named creditor is an appellee before this court. It urges as a reason why it should not be charged with the sum last stated, that the mortgage junior in rank should be required to pay the two amounts just stated: expenses of administration, without regard to the fact that the mortgages rest against different tracts of land.

We have noticed that the creditor whose mortgage is first in rank does not appeal, but filed an answer before this court, asking that the judgment be amended so as to relieve him from the contribution of three hundred and twenty-seven dollars, and fifty-one cents, the only amount involved in so far as it is concerned on appeal.

The appellant, opposing this demand to amend, avers that the amendment can not be made on an answer. That the creditors other than this appellee, and the appellee himself, are all co-appellees and an appeal is the remedy.

The appellant Wellman, in the District Court, opposed items for

the salaries of clerks, on the ground that if due, they were not privileged.

This opposition having been dismissed, the account as amended and reinstated by the Judge of the District Court, was homologated.

We take up the first issue for our determination, growing out of appellants' objection to an amendment of a judgment on the answer of one of the appellees, affecting the interests of the co-appellees.

It is true, this court is seized of jurisdiction to amend a judgment as between appellant and appellee, and not as between the appellees, but we do not understand in this case that the answer, praying an amendment filed by one of the appellees, can, in any manner, affect the rights of the other appellees. The question is exclusively one between the appellant and the appellee praying for an amendment of the judgment. Be the result what it may between the appellant and this appellee, not one of the other appellees will receive less on his claim. Whether the mortgage prior in rank shall suffer a contribution in favor of the law charges and other expenses of administration, is the only issue.

The proceeds of unencumbered property had been applied to the payment of cost. The appellees, other than the mortgagee Wellman, have interest in the contribution which must be made to pay the balance.

The position may be summed up thus: The mortgage creditor, appellee, says to the creditor with mortgage junior in rank: "Your mortgage must be charged with this amount and not my mortgage."

Be the answer and result what it may, the other creditors are without interest.

Two appellees with concurrent rights, one remaining silent and the other seeking to have the judgment amended, the case would be different. The rule invoked by the appellant would apply. Here no interest of any other appellee, prior, concurrent or subsequent, is involved.

The next issue in the case involves the application of the principle that the first mortgage creditor, having his mortgage upon a single immovable, has in the event of insolvency the right to insist that the proceeds of the movables and of the immovables upon which rest mortgages junior in rank, be exhausted before his fund can be made to contribute to the payment of the general privileged claims. The mortgage of the appellant we have seen was

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the junior mortgage. The decisions invariably hold that the junior mortgage must contribute the required amount. *Devron vs. His Creditors*, 11 An. 482; *Deverges vs. His Creditors*, 18 An. 169; *Succession of O'Laughlin*, 18 An. 142; *Ventress vs. His Creditors*, 20 An. 359; *Succession of Rousseau*, 28 An. 3; *Succession of Marc*, 29 An. 414. It follows that the amount of three hundred and twenty-seven dollars and fifty-one cents, heretofore charged to the appellee, must be charged to the appellant.

This brings us to the objection of appellant to the salaries of three clerks, amounting to five hundred and seventy-three dollars and fifty-one cents, viz.:

Bondy.....	\$263 70
LeBlanc.....	142 00
Navra.....	177 61

The record does not show that these claims were recorded, nor does it appear that the services for which salaries are claimed were rendered after the insolvency had been declared. These claims were all opposed. The *onus* of proof was with these creditors. We are compelled to hold that they have no privilege whatever, as against immovable property, since it does not appear that their claims were recorded.

The law is clear, no privilege on immovable property, such as here claimed, shall affect third persons unless duly recorded.

These claims were numbered 40, 41, 42 in the account and were charged to items 12 and 13 of assets in their proper proportion. These last items, assets, cover the immovable property upon which the appellant had a mortgage.

It is ordered, adjudged and decreed that the judgment appealed from be amended by crediting the appellee, the New Orleans National Bank, with the amount of three hundred and twenty-seven dollars and fifty-one cents, and debiting the appellant, Henry Wellman, with the sum of three hundred and twenty-seven dollars and fifty-one cents.

It is further ordered, adjudged and decreed that the claims of Bondy for two hundred and fifty-three dollars and seventy cents, of O. L. LeBlanc for one hundred and forty-two dollars, and L. J. Navra for one hundred and seventy-seven dollars and eighty-one cents, be not charged to said items 12 and 13. The claims of these three clerks

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for salaries in so far as relates to a privilege on appellants' property are dismissed.

The liquidator's account and the judgment of homologation having been amended, as amended the judgment is affirmed at appellees' costs.

No. 12,436.

THE STATE VS. M. KEAVENY.

An application for time to file a rule for new trial is properly refused when based on an affidavit of newly discovered testimony only contradictory, in its character, and on other testimony when no diligence is shown to have been used for obtaining the testimony on the trial.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Baker, J.*

M. J. Cunningham, Attorney General, and *R. H. Marr*, District Attorney, for Plaintiff, Appellee.

J. Q. Flynn for Defendant, Appellant.

Submitted on briefs March 6, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

MILLER, J. This is an appeal from the sentence following the verdict of guilty against defendant on an indictment for inflicting a wound less than mayhem.

The appeal comes here with no bill of exceptions reserved during trial. The reliance of counsel for the accused is on his application for time to prepare affidavits and file a rule for new trial and the bill reserved to the denial of the application. The application and affidavit in its support assigned as grounds the discovery of material testimony since the trial. The testimony, it is claimed, would prove statements of the deceased at the time of the cutting, contradicting the testimony of the police officers who testified against the accused, and another witness, an eye-witness, it is claimed, would confirm the statement of the accused.

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The law gives the accused ample opportunity to prepare for his defence and exhibit it by testimony before the jury. When after conviction, an application for new trial is made, on the ground of newly discovered testimony, the law exacts that due diligence must be shown why the testimony was not produced on the trial. It is further required the names of the witnesses and the materiality of their testimony should be exhibited. It is settled that the mere production of contradictory evidence affords no basis to give a new trial. Here, instead of a rule for new trial there is only an application for time to frame an application, manifestly, we think inadmissible and open to the objections to which the rule for new trial would be subject.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

No. 12,372.

WILLIAM GRANT VS. JOHN A. BUCKNER.

A party who is proceeded against in a State court by a receiver in a Federal court for the payment of rents due, may plead in compensation and extinguishment thereof, a sum said receiver has previously collected in excess of what he was entitled to have received.

A PPEAL from the Seventh Judicial District Court for the Parish of East Carroll. *Montgomery, J.*

C. S. Wylie and J. D. Rouse for Plaintiff, Appellant.

Joseph E. Ransdell and Saunders & Miller for Defendant, Appellee.

Argued and submitted January 23, 1897.

Opinion handed down February 15, 1897.

The opinion of the court was delivered by

WATKINS, J. This is a suit for rent, and it was defended mainly upon the plea of offset or compensation, and on the trial there was judgment in favor of the plaintiff for the amount of the debt, and a

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corresponding judgment in favor of the defendant, one judgment compensating and extinguishing the other. From that judgment the plaintiff prosecutes this appeal.

The facts necessary to be stated are very fairly recited in the original brief of defendant's counsel, and to which there appears to be no objection urged on the other side, and consequently we append an extract therefrom as furnishing an historical *resumé* thereof, viz.:

"The present suit grows out of a receivership proceeding which has been pending for many years in the United States Circuit Court for the Eastern District of Louisiana.

"The controlling facts bearing upon this testimony may be briefly stated.

"Oliver J. Morgan was, in *ante-bellum* times, a rich planter, owning five plantations in Carroll parish, Louisiana. His wife died intestate, in 1844, leaving but two children. All the property standing in her husband's name at the time of her death belonged to the community of acquets and gains that existed between them. Her two children, therefore, as her sole heirs, became, on her death, the owners of her undivided one-half of the community property.

"Mr. Morgan, however, wished to settle, during his own lifetime, the rights of his two children in his wife's estate and his own. In execution of this design, he conveyed, in 1858, certain property to Mrs. Julia Morgan, one of his daughters, then living, partly as a donation from himself and partly in satisfaction of her rights as one of her mother's heirs. And to the children of a pre-deceased daughter, Mrs. Kellam, he made a similar conveyance of other property, partly as a donation and partly in satisfaction of their rights as heirs of Mrs. Kellam. The defendant, John A. Buckner, is now the sole representative and heir of the interest of the Kellam children. Melbourne plantation was the property so conveyed and donated by Mr. O. J. Morgan to the children of his pre-deceased daughter, Mrs. Kellam, in satisfaction of their interests in his wife's estate and his own. Mr. Morgan died in 1860, and there was then no question as to the enormous solvency of his estate. But as the result of the war partly from the emancipation of the slaves and partly for other causes, the value of the estate was greatly decreased by 1867. In that year an administration of the estate of Oliver J. Morgan was opened and all of his property sold. At these sales the heirs bought

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in the plantations so as to continue owning them in the same manner as had been intended by Mr. Morgan.

"Some years after these sales Gay, a personal creditor of Oliver J. Morgan, and not of the community, filed a bill in equity in the Federal Circuit Court to set the probate sales aside on the ground of fraud. After a long litigation the probate sales were set aside. But the avoidance of these sales simply subjected the community interest of the succession of Mr. O. J. Morgan in the several plantations to the pursuit of his creditors, but did not forfeit or affect the interests of the descendants of his two daughters to their mother's rights in the community. It became, therefore, incumbent on the Federal court to determine in what proportion and by what title the several plantations belonged to the heirs of Mrs. O. J. Morgan, and in what proportion they belonged to the succession of Mr. O. J. Morgan, her husband. The determination of this question was complicated by the fact that the plantations and their equipment constituted a part, and not the whole, of the community property as it had existed from Mrs. Morgan's death, in 1844, to her husband's death, in 1860, the slaves and much other property having disappeared during the war. It was further complicated by the fact that each branch of Mrs. Morgan's heirs had accepted from her husband, after her death, specific property in satisfaction of their interests in her estate, and that the whole of the property so accepted had from that time on been in the possession and enjoyment of the heirs.

"The Supreme Court of the United States finally adjusted the interests of the heirs and of the creditors. *Mellen vs. Buckner* (139 United States, 410). In this adjustment it was decreed that John A. Buckner, as sole surviving representative and heir of one branch of Mrs. Morgan's heirs, should be recognized as owner of one-half of Melbourne plantation, and that the other half of said plantation should be liable for the personal debts of Oliver J. Morgan. The decree was silent as to the ownership of the revenues of the plantation, but contains nothing indicating that the revenues were not to follow the title. The decree of the United States Supreme Court recognized that the acts of donation and conveyance executed by Mr. O. J. Morgan in 1858 were valid in so far as they conveyed specific property to his wife's heirs in satisfaction of their interest in her estate, but held that they were void in so far as they purported to be donations of property of his own. That this is the effect

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and meaning of, that decree has been declared by the Circuit Court. The result, therefore, of this decree is to establish that John A. Buckner, or those of whose rights he is now sole heir, have been, since 1858, owners of an undivided one-half of Melbourne plantation. The decree simply ascertains and declares the fact as it had always existed.

"Before the final decree of the United States Supreme Court in 1891 (*Mellen vs. Buckner*, 139 United States, 388), all the plantations had been in charge of a receiver appointed by the Federal Court in the suit to set aside the probate sales. This receiver had rented Melbourne plantation as an entirety to the defendant, John A. Buckner, for the years 1886, 1887, 1888 and 1889, and by his admission (*Tr.*, p. 63) had collected from him nine thousand nine hundred dollars, as the rent of the whole of said plantation for said years. According to this showing, the receiver, acting as receiver, had collected from Buckner, for rent, four thousand five hundred dollars more than he was entitled to collect during the years 1886 to 1889. He now brings this suit to collect from Buckner the rent for one-half of Melbourne plantation for the years 1891 to 1892; one-half of the taxes on Melbourne for those years, and a trifling sum for the rent of some other property, aggregating in all two thousand and fifty dollars and twenty-two cents.

"To this demand Buckner pleads in compensation and reconvention the amount due him by the receiver, about four thousand six hundred and fifty-four dollars and twenty-five cents. The lower court allowed the plea, so far as required to extinguish the claim propounded by the receiver in this suit, but did not give judgment over against the receiver for the surplus (p. 75).

"The contention of the defendant is that the plaintiff, in his capacity as receiver, has already collected from him (defendant) more than double the amount now sued for; that this amount was collected by the receiver as rent for the very plantation, for additional rent of which this suit is brought; that on a full accounting of rents due to and collected by the receiver from defendant for rent of Melbourne plantation, the receiver has been overpaid by several thousand dollars; that what the plaintiff owes defendant is due in his capacity as receiver for money actually paid by defendant to plaintiff since his (plaintiff's) appointment as receiver, and which, having been unjustly collected, should be at once withdrawn from the funds of the receivership and returned to defendant."

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In response to this plea the plaintiff argues:

"That the decree of the United States Supreme Court gave defendant one-half of Melbourne plantation in payment and satisfaction of a debt due him by the succession of O. J. Morgan, but did not give him the *revenues* accruing therefrom antecedent to the gift."

As explanatory of the situation of affairs in the United States Circuit Court we append the following decree of that court, which embraces the primary subject of the contestation in the instant case. It is as follows viz.:

"United States Circuit Court, Eastern District of Louisiana.

"D. C. MELLEEN, Administrator, etc.

VS.

"OLIVER J. MORGAN, Testamentary Ex., etc.,
et al.

"JOHN A. BUCKNER ET AL.

VS.

"D. C. MELLEEN, Administrator, etc.

"NARCISSE K. JOHNSON, ET AL.

"D. C. MELLEEN, Administrator etc.

} All Consolidated.

"On application of John A. Buckner *et al.* for a partial rehearing.

"The decree complained of, and the master's report upon which the decree is based, are founded on the proposition that in the main case, originally, Gay, Administrator, etc., vs. Morgan, Dative Testamentary Executor, etc., *et al.*, the complainant for himself and the other creditors recovered from the estate of Oliver J. Morgan, deceased, and brought into court as a fund to be distributed to the creditors and claimants of such estate, a large landed property belonging to said Oliver J. Morgan, situated in Carroll parish, State of Louisiana, and consisting of five plantations contiguous to each other, to-wit: Wilton, Melbourne, Westland and Morgan.

"The opinion of the Supreme Court, rendered in the case and reported in Johnson vs. Waters, 111 United States, 640, in connection with the decree there directed to be entered, seems to support such proposition.

"The only reservation referred to in the opinion found in the decree directed is thus stated in the decree:

"The said master may apply to the court from time to time for further directions, which are hereby reserved, especially as to the question whether the succession of Julia Morgan, deceased, is entitled to any portion of the proceeds arising from the sale of said

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lands by virtue of the act of sale and donation made to her by Oliver J. Morgan in 1858, so far as the said act was a sale and not a donation.

"The opinion of the court is clear that the act of 1858 was void as a donation, and it apparently intimates, as this court afterward decided, that it was equally void as a sale. The opinion and decree of the Supreme Court, however, rendered in the consolidated cases of Mellen vs. Buckner and Mellen vs. Johnson, reported in 189 United States, 388, when carefully read and considered in the light of the facts and circumstances of the case, puts a different view upon the matter. In that case the act of 1858, while still held to be void as a donation, is held to be valid (as a sale or appropriation) for so much of the lands in question as were received by the heirs of Narcisse Deeson in payment of the debts due by them on account of the interest Narcisse Deeson had as the wife of Oliver J. Morgan in the community property, and it is said that this was substantially the view which the court entertained, although not fully explained in the case of Johnson vs. Waters.

"And the Supreme Court, probably, in order that no further mistake might be made as to the scope and effect of their opinion, rendered a specific decree in which after consolidating the causes then before the court with the principal case of Gay, Administrator, vs. M. F. Johnson, Executor, etc., and by way of supplement to the decree in said principal case, it was among other things decreed that the heirs of Julia Morgan, deceased, and of Oliver H. Kellam, deceased, as creditors of the estate of Oliver J. Morgan be rejected, and that in place of such supposed claims the said heirs were entitled to have and retain a certain claim portion of said Oliver J. Morgan's estate, free from the claims of his creditors, to-wit: one two-fifths of the other four plantations to the Julia Morgan heirs; the decree then provides that all the remaining interests in said plantations shall be subject to the payment and satisfaction of the debts due to the creditors who shall have established their debts before the master in said original suit, and then for a partition in kind, or by licitation, as the said heirs should direct.

"From this last opinion and decree of the Supreme Court in the matter, we are forced to conclude that the portions of lands set off and adjudged to the heirs of Julia Morgan and heirs of O. H. Kellam, Jr., were so set off and adjudged to them as the owners thereof in their

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own right, as the heirs of Julia Morgan and O. H. Kellam, Jr., who were the heirs of Narcisse Deeson, the wife of Oliver J. Morgan, and not to them in any way as the heirs of Oliver J. Morgan, *or as creditors or claimants of his estate.*

"This would be very clear to us were it not for the increase of about fifteen per cent. allowed to the heirs of Julia Morgan and about seven per cent. allowed to the heirs of Oliver H. Kellam, Jr., over the portions said by the Supreme Court to have been acquired by them under the act of 1858, so far as it was valid, which increase was certainly taken out of the estate of Oliver J. Morgan, but which was considered admissible by the court on general principle of equity.

"To the extent of this increase the heirs of Julia Morgan and Oliver H. Kellam, Jr., participated in the fund recovered in the original case of Gay, Administrator vs. Morgan, Executor, *et al.*, but the careful reading and consideration of which we have given the opinions and decrees of the Supreme Court, and particularly the supplemental decree in all the cases consolidated, give us the firm impression that the court intended *to hold and declare that the portions recovered by said heirs were theirs of right*, and that they were to have them not only free of the claims of creditors of the estate of Oliver J. Morgan, but free from all costs and claims, except as in the several decrees adjudged, and as thereafter might be necessary in effecting partition.

"It follows that the petition of the Kellam heirs for a rehearing of the final decree, rendered June 2, 1863, should be granted, but only granted so far as said heirs are concerned, unless the maintenance of the exceptions filed by them necessarily required a revision of the decree of distribution. If such revision is not necessary, then it seems that, as we have fully examined the question of the liability of the Kellam heirs to contribute to the expenses in the original suit of Gay, Administrator, vs. Morgan, Testamentary Executor, we may now grant an order granting a limited rehearing, and at the same time pass a decree sustaining the exception of the Kellam heirs, but otherwise maintaining the decree of June 2, 1863, and thus put an end to the long litigation of the case as far as this court is concerned.

" (Signed) DON A. PARDEE, *Circuit Judge.*

"Judge Parlange concurs.

"April 17, 1895."

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Vide Johnson vs. Waters, 111 U. S. 640; *Mellen vs. Johnson*, 139 U. S. 388.

From the foregoing opinion and statement of facts, it is clear that prior to the final adjudication by the Supreme Court of the relative rights of the respective parties, all of the plantations involved in the litigation had been under the control and management of the receiver, and that he had rented the entire Melbourne plantation to the defendant, John A. Buckner, for the years 1886, 1887, 1888 and 1889, and had collected rents of him therefor, aggregating nine thousand nine hundred dollars in amount—that is to say, four thousand nine hundred and fifty dollars more than he was entitled to collect during those years.

As the present suit involves the rent of the years 1890 and 1891, and some small arrearages of taxes, the defendant pleads, in compensation and extinguishment thereof, a sufficient amount of said sum in excess, to satisfy the receiver's demands.

In this court the defendant and appellee has answered the plaintiff's appeal, and prayed that the judgment appealed from be so amended in his favor as to reserve him "the right to demand and recover from said William Grant, receiver, the difference between the amount required to compensate the demands of the said William Grant, receiver, set up in this suit, and the amount due to said John A. Buckner, by the said Wm. Grant, receiver."

It seems to us to be perfectly apparent that the decree of the court recognizing the right of the heirs of Julia Morgan to one-half of the Melbourne plantation, of necessity carried therewith a right to a proportionate amount of its annual revenue and equally so the right to demand of the receiver a restitution of the amount he has unduly received.

We are of opinion that the defendant has the right to urge the plea of compensation to an amount sufficient to relieve himself from personal liability to the plaintiff. As the receiver has sought the enforcement of his demands in a court of the State, he can not, at the same time, turn the defendant around to another recourse in the United States Circuit Court.

The demand in compensation herein made is but a claim to discharge a present obligation for the rent of two years now due, by the application thereto *pro tanto* of the avails of previous years during which the receiver collected a greater sum than he was entitled to

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have received. *Beattie, Syndic, vs. Scudday*, 10 An. 404; *Mercer Admr., vs. Lobit*, 10 An. 47; *Lemane vs. Lemane*, 27 An. 694.

The doctrine *quæ temporalia sunt* applies to the defendant's demands. What he might not use as a sword he may use as a shield.

We are of opinion that defendant is justly and equitably entitled to compensation.

That while admitting possession of rents taken from the defendant to a greater amount than he was entitled to receive, the receiver can not stay the defendant's demand in compensation, as a means of enabling him (the receiver) to still further increase his receipts and relegate him to another tribunal for ultimate settlement thereof.

The judgment should be so amended as to conform to the answer of the appellee, and as thus amended, the same should be affirmed.

It is therefore ordered and decreed that the judgment appealed from be so amended as to reserve the defendant's right to demand of and receive from the plaintiff the residue of the amount of the rents he has collected in excess of the sum actually due by the defendant, after a sufficiency thereof has been used to extinguish by compensation the demands of said receiver in this suit; and that as thus amended same be affirmed at the cost of the plaintiff and appellant in both courts.

No. 12,325.

STATE EX REL. CRESCENT CITY RAILROAD COMPANY VS. A. C. BELL,
CITY ENGINEER.

In the first contract between the plaintiff and the municipality, that the lines and levels of the contemplated road would be furnished by the surveyor.

That duty is incumbent upon that officer, under the terms of the contract. He can not in law decline to act before he is stopped by the legal action of the constituted authorities.

Mandamus lies to compel the performance by an officer of duties purely ministerial. The defendant joined issue on the merits.

McEnery, J., dissenting: When the public officer is to be reached by *mandamus*, it must be when his duties, which are sought to be enforced, are public, clear and unequivocal, in which there is no latitude for the exercise of his discretion.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Farrar, Jonas & Kruttschnitt for Relator, Appellee.

State ex rel. Railroad Co. vs. City Engineer.

James J. McLoughlin, Assistant City Attorney, and Samuel L. Gilmore, City Attorney, for Defendant, Appellant,

Henry P. Dart, *amicus curiæ*, submits a brief.

Argued and submitted February 5, 1897.

Opinion handed down February 15, 1897.

Rehearing refused (reasons assigned) April 12, 1897.

The opinion of the court was delivered by

BREAUX, J. The relator applied for a writ of *mandamus* to compel the City Engineer to furnish it lines and levels, for the construction of its railroad through the neutral ground of Carrollton avenue, from Second to Fourth streets.

The relator claimed that it owned a railroad franchise and that subsequently the City Council passed an ordinance, under which certain changes were made in the matter of the line of the railroad; that instead of the right to use either Fourth or Second street from Broadway to the upper *terminus*, it was ordained that it shall construct its road on Second from Broadway to Carrollton avenue, thence through the neutral ground of Carrollton avenue to Fourth, thence along Fourth street to the parish line. The relator alleged that the whole road has been completed except that portion which runs through Carrollton avenue from Second to Fourth street; that the whole of the line has been for some time operated from the lower *terminus* up Second street to Carrollton avenue, and relator is anxious to connect its line so as to operate its line from *terminus* to *terminus*.

The respondent returned in answer to the preliminary order issued on the application for a *mandamus*, that it was not his duty to deliver to relator lines and levels, because the amending ordinance under which the relator claims a franchise has been repealed by the City Council.

If it has not been repealed, then relator sets up that relator's allegations are vague and indefinite, and that they do not indicate upon what neutral grounds to establish the lines and levels; that they do not designate upon which of the three strips of neutral ground on Carrollton avenue the tracks are to be laid.

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And, lastly, the grounds are that the relator has no contract with the city and holds no franchise from the city; that the alleged contract is void.

As a question of fact, it is not disputed that the relator has constructed its line of road as alleged in its petition.

The ordinance under which relator claims a franchise was considered and discussed in the case of Crescent City Railroad Company vs. New Orleans & Carrollton Railroad Company, 48 An. 856, 866. It relieves us from the necessity of discussing at length the original ordinance, under which the relator acquired its franchise.

It is also a fact that relator accepted the terms and conditions of the ordinance.

Subsequently, the council took it in hand to repeal the ordinance granting the franchise claimed. It appears that the action of the City Council was made final after the service of the alternative writ of *mandamus* upon respondent. If there is a right of action, no question is raised as to the want of authority to proceed by way of *mandamus*; in other words, it was not contended that the relator had mistaken its remedy. From the specifications made part of the first ordinance we extract: "This road shall follow the route described in the above ordinance, and indicated in the accompanying plan. The full red lines in said plan shows the route proposed, and the dotted red lines the route which the purchasers have the option of using."

"It shall be built on lines and levels given by the City Surveyor."

From a judgment making the writ of *mandamus* peremptory the respondent prosecutes this appeal.

The repeal of the ordinance *vel non*, authorizing a change in the route of the road, is the first question before us.

The council had entered into a contract with relator, and adjudicatee of a franchise. So far as the record reveals, the relator had complied with the terms of the adjudication; the amount of the bid had been paid. The relator, in so far as we are informed, had complied with its contract. It had constructed its road on lines and levels furnished, and only a short distance remained to be constructed from *terminus* to *terminus*. There was an existing contract between the city and the corporation relator. It was no longer within the power of the city to treat this contract as an absolute

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nullity and to pass an ordinance canceling the prior ordinance changing the route and abrogating all possibility of claiming any right under it. There was no question of fraud or unfair dealing of any kind disclosed by the record. By its execution the contract acquired a validity to which effect should be given until it is regularly annulled contradictorily with the party in interest.

In our opinion, in the case of Railroad Co. vs. Mayor, 48 An. 1102, 1115, in regard to a similar question, we said: "We would not be justified in treating the ordinance as void. It must remain in force until decreed null in proceeding to that end. It may be that the council, desiring to encourage plaintiff's enterprise, has conceded more than it should have conceded; nevertheless, the concession was made and has been accepted and the conditions complied with. It has become a *fait accompli*, which under any view is not void and can not be absolutely ignored by the defendant as attempted by ordering the reopening of the street."

We must adhere to the principle laid down in that case. It applies here. It is an equitable principle applying even if a contract is null in its origin. *Multa fieri prohibentur quæ si facta fuerint, obtinent firmitatem*. If a contract is voidable proper steps must be taken to have its nullity declared.

The respondent insists in the second place, for reasons stated, that he can not furnish the lines and levels. The ordinance pleaded by the relator directs the course to follow. Lines and levels having been given in other streets, there is no good reason for coming to a stop with this work at Carrollton avenue. Manifestly there is a neutral ground on that avenue.

Respondent admits in his answer that there are such grounds; the difficulty it appears consists in the fact alleged by him that they are divided into three strips. That of itself should not be considered enough to prevent the running of the line. The line can be drawn under the ordinance despite the strips.

Lastly, the respondent insists that the relator has no contract with the city, and holds no franchise from the city; the alleged contract offered in evidence by relator being absolutely null and void.

In discussing the second proposition of respondent's answer, we found that the relator did enter into a contract with the city as alleged, and we decided that it was not subject to collateral attack. We will only add that, in our judgment, a ministerial officer called

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upon to execute an ordinance is without authority to raise the question the position here taken implies.

The question was carefully considered by us in the case of *State ex rel. N. O. Canal and Banking Company et al. vs. Heard*, 47 An. 1679, and the conclusion was reached that a doubt as to the validity of a statute would not justify a ministerial officer, who has no interest involved, in raising questions of irregularity of its adoption.

In our judgment the decree of the lower court was correct. It must be and it is affirmed.

NICHOLLS, C. J., rests his concurrence on the ground of acquiescence.

DISSENTING OPINION.

MCENERY, J. I dissent from the decree in this case for the following reasons:

I will briefly refer to two grounds assigned by the respondent why a *mandamus* should not be granted.

First. The nullity of the grant to the plaintiff corporation to change the route previously granted to it and to occupy the territory through which the respondent officer is required to give lines and levels; in other words, to locate the plaintiff's street railway. Probably this would in itself not be a sufficient excuse, but it is to be considered in connection with the repealing of the ordinance granting said franchise, which is set out as an excuse.

But, if under the authority of *State ex rel. Nicholls, Governor, vs. Shakespeare, Mayor*, 41 An. 156, and *Railroad Co. vs. Railroad Co.*, 47 An. 315, he has no right to question the validity of a law which defines his official duties, the same authority is good for the assertion that he must respect the law which repeals the former and imposes new duties upon him. He must conform his duties to the immediate law which defines them. It is the duties *vel non* of the officer under consideration. We have no right without all parties interested are made parties to break down the immediate law and look for his duties in the ordinance which was repealed by the City Council.

Act No. 135 of 1888 requires the franchises of all street railways to be offered at public sale, and adjudicated to the highest bidder. The Legislature has declared that these franchises are of value, and that the city is without power to gratuitously grant them.

My attention has been called to the case of *East Louisiana Railroad Company vs. City*, 46 An. 526. In that case the issue presented

was whether or not the railroad was a street railway. If so the grant was null and void, notwithstanding the acceptance of the grant by the railway corporation and the money expended by it in perfecting the same. This was conceded in the case. The court found that the railroad corporation was engaged in transporting freight, passengers and mails beyond the city limits, and did not come within the purview of said act. It was a railroad and not a street railway, and the City Council of New Orleans, without complying with the provisions of the act, could grant the franchise.

The same principle was decided in the case of New Orleans City & Lake Railroad vs. Dr. W. H. Watkins, 48 An. 1550. This court held that it was a street railway, and not a railroad, and the grant was null and void, because of a failure to comply with the provision of Act No. 138 of 1888.

There can be no acceptance of a grant null and void, which will give it validity, and no amount of money expended in utilizing it can have the effect of giving validity to that which has none.

In the instant case, the Crescent City Railroad Company was granted the privilege of changing its route and occupying parts of other streets to the distance of many squares. It is held by the court that the corporation accepted the grant and built its tracks to Carrollton avenue. If the City Council has the right to grant the use of one street to the distance of several squares, it has undoubtedly the right to extend the distance indefinitely. The act of the Legislature gives them no such right, but declares the occupancy of any street by a street railway company has a value for which it must pay the city. How easy it would be to defy the act of the Legislature, by a council complacent in its disposition to gratify corporations, by allowing a bid for a franchise on important thoroughfares, and then grant the privilege of occupying streets over which the franchise would be immeasurably advantageous and valuable to the corporation. The Crescent City Railroad Company got a valuable franchise without complying with the law, for which it paid nothing, and the City Council of New Orleans had the undoubted right to repeal it; to declare it null and void, and to require the corporation to occupy the territory to which it was legally entitled, and for which it paid the city.

Second. It is the repeal of the ordinance granting this franchise which the respondent pleads as against the *mandamus*. It is a com-

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plete defence. The question presented is the enforcing of a duty from an officer by *mandamus*, whether it contemplates a public duty which the officer is required to perform. Is there any public duty imposed upon the officer, the City Engineer, to give lines and levels to the plaintiff corporation?

There is at issue between the city of New Orleans and the plaintiff corporation the construction of a contract. The city is not a party to this proceeding. The attempt is to force the specific performance of a contract through the respondent officer. The City Engineer is called upon to interpret that contract, and to reach him and to enforce this *quasi*-judicial function upon him without the appearance of the city, this court declares the repealing act null and void, and proceeds by *mandamus* to compel the specific performance of a contract. What will be the results of the decree?

In the case of Crescent City Railroad Co. vs. New Orleans & Carrollton Railroad Co., 48 An. 856, we held that there was lacking legislative permission from the City Council for the plaintiff corporation to occupy the roadbed of the defendant corporation, the Carrollton Railroad; that there was no right to occupy said roadbed, unless the grant could not be enjoyed without it. We held that under the issues presented in that case there was unoccupied territory over which the company could place its track. The whole matter of the location was, in fact, left to the discretion of the City Council, which could at any time locate the proper route, even over the road of the Carrollton Street Railroad.

The decree in this case is that lines and levels shall be given over the neutral ground. Where is this neutral ground? There are spaces on each side of the Carrollton Railroad tracks. Where shall the city official locate the roadbed?

If on the upper side the City Council may say this is not the proper location, and by ordinance, which it has the undoubted right to enact, say the roadbed must be located on the lower side.

Suppose the officer locates the road over the tracks of the Carrollton Railroad Company, it will be in violation of the decree of this court, which said that no right in the Crescent City Railroad Company had been shown to authorize the occupancy of the Carrollton railway tracks. The decree, in its execution in this way, would require of the City Engineer to do that which we said in the last case referred to, the City Council had failed to do, and which

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failure prevented the Crescent City Railroad Company from going over the Carrollton Railroad tracks. The decree makes the City Engineer the instrumentality to supply deficiencies in the legislation of the council, and it also imposes upon him a *quasi*-judicial function in the interpretation of a contract between the city and the Traction Company.

The City Engineer gave the Crescent City Railroad Company lines and levels on the upper side of the street. See cases *ut supra*. If the theory of the court is correct, that by accepting a gratuitous franchise it became perfected, the Crescent City Railroad Company was bound by this location, for it occupied the same, and commenced work along the location. But it was dissatisfied with the location, and subsequently procured an ordinance from the City Council, declaring that it should occupy the neutral ground of Carrollton avenue. See case of Crescent City Railroad Company vs. New Orleans & Carrollton Railroad Company, 48 An. 856. That neutral ground has not yet been ascertained. The council has failed to designate it. The City Engineer is required by the decree to do so. The most serious complaint, however, against the decree, is that it makes the writ of *mandamus* the means of inquiring into and interpreting a contract and ordering its specific performance in order to enforce the duties of a public officer, which are declared to be public, when, in fact, they arise out of a purely private obligation. The City Engineer, having at one time complied with his duty in giving lines and levels, he can not be compelled to perpetually perform his duty.

When the public officer is to be reached by *mandamus*, it must be when his duties, which are sought to be enforced are public, clear and unequivocal, in which there is no latitude for the exercise of discretion.

In my opinion this whole controversy should be left to the City Council of New Orleans.

Street railways are multiplying in a city in which the streets as a general rule are narrow. These corporations are fighting for territory. Efforts are daily made to occupy streets and the roadbeds of other roads. Cars are sent over the tracks in such number as now to threaten danger to life and limb. The City Council should not be hampered in its dealings with these corporations to prevent future calamities.

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A grave responsibility is now upon the City Council in dealing with the demands of these corporations, and the courts should reluctantly interfere, and set a rule for the guidance of the city authorities, which may prevent the application of a heroic remedy in the interest of the safety of the citizens.

There are times and there are occasions when vested rights give way to public safety. The time will come when the City Council will be compelled to give attention to the free use of the streets in removing the danger which is now so imminent to those who daily pass upon them.

The repealing ordinance recites, in my opinion, good reasons why the Crescent City Railroad Company should go back to its first grant. I think it should be respected on the ground that the council has the discretion to judge of the necessity of forbidding too many cars on a street, and the proper regulation of the same in the interests of the convenience and safety of the inhabitants.

ON APPLICATION FOR A REHEARING.

BREAUX, J. We have re-examined the questions involved in this case.

In the defence, before our decision was handed down, respondent suggested the difficulties confronting him in surveying the roadbed over the neutral ground of Carrollton avenue and averred the additional ground that the ordinance, under which relator holds, was repealed.

Under the rules of this court it is not possible, on the application for a rehearing, to have other issues considered than those previously submitted, particularly if not raised in the pleadings. The inability of the defendant to stand in judgment had not been pleaded, notwithstanding it is argued in one of the briefs filed by an *amicus curiæ* on rehearing.

But granted that the point has been pleaded for the sake of the argument. In our view, we state *ex industria*; *mandamus* could be issued. This officer had been selected by the city and the relator to make needful surveys to carry out the contract and deliver lines; we concluded that he should, in accordance with the terms of the contract, indicate the *locus* granted for the right of way, and that the difficulties suggested are not sufficient to prevent him from indicating what should be occupied as a roadbed.

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If there are other interests concerned they must be urged by those by whom they are owned or by those who have a right to stand in judgment.

With reference to the repeal of the ordinance invoked as a defence, we cite the following decisions in support of the refusal to grant a rehearing: State ex rel. City vs. Railroad Co., 44 An. 526; City of New Orleans vs. Wardens, 11 An. 244.

No. 12,437.

STATE EX REL. JOSEPH L. COURTNEY, PRAYING FOR HABEAS CORPUS.

The District Court had jurisdiction over the case. This court, upon an application for a writ of *habeas corpus*, declined to oust the District Court of jurisdiction. The court is without authority in these proceedings to determine whether the jury was discharged with cause sufficient, or without cause. The law presumes that there was sufficient cause until the contrary appears. The writ of *habeas corpus* is not the proper remedy to bring up the questions involved for review. It was within the power and duty of the District Court to discharge the jury for gross irregularities which would have vitiated the verdict. The irregularities charged can not be reviewed on *habeas corpus*. For the purpose of discharging the applicant, the court will not on *habeas corpus* consider the sufficiency of facts relied on as evidencing former jeopardy.

This court may inquire, under a writ of *habeas corpus*, into the jurisdiction of the court over the one condemned, but can not correct errors in proceedings and vacate an order under which the accused is held for trial.

In a case presenting similar issues, this court discharged the rule *nisi* and denied the application. 45 An. 316; Church on *Habeas Corpus*, Sec. 254; 60 N. Y. Court of Appeals, 570.

Our statutes have not enlarged the functions of the writ as interpreted under the common law. The assignment of errors does not add to the functions of the writ of *habeas corpus*.

Pujo & Moss and Edward L. Wells for Petitioner.

M. J. Cunningham, Attorney General, and A. R. Mitchell, District Attorney, for Respondents.

Argued and submitted March 8, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

BREAUX, J. The relator being in confinement in the jail of the parish of Calcasieu applied for a writ of *habeas corpus*, alleging that his imprisonment was without authority of law.

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An order *nisi* was issued upon the petition in the usual form.

The trial judge in his answer controverts the grounds upon which the relator claims to have been placed in jeopardy.

The prominent facts are that a jury had been empaneled, the evidence had been heard when the court adjourned on Saturday night to the following Tuesday. The two intervening days were *dies non*. A copy of the minutes shows that on Tuesday, after the jury had returned into court, by order of the court they were discharged "on account of gross irregularities on the part of the jurors and the officers in charge, pending the sequestration, brought officially to the attention of the court by the officers thereof."

It also appears of record that defendant's counsel objected to the discharge of the jury and denied that there were any irregularities.

The charge against the accused, for which he was being tried when the order was issued, was murder. He was remanded to jail.

It is alleged by the defendant that the order of the judge recommending him to jail was illegal, and he assigns as reason that the record fails to prove that any evidence was taken by the court from which the fact was adjudged that it became necessary to discharge the jury.

The sheriff, in compliance with the order *nisi* issued by this court, states that he was requested by the relator to release him from further custody; that in obedience to the order of the trial judge he refused.

The trial judge in his answer disagreed with counsel for defendant in regard to certain facts alleged by them. It does not appear of record that the defendant applied to the District Court to be released, on the grounds urged on the application for the writ of *habeas corpus*.

Before this court, on behalf of the State, it is urged that *habeas corpus* is not defendant's remedy.

A similar question was before us for our determination in the case of State ex rel. Emma Williams vs. Remy Klock, 45 An. 316, in which case we decided not to discharge a prisoner on *habeas corpus* (while an indictment is pending), on the ground of *autrefois convict* and *autrefois acquit*. That decision was carefully discussed by us at the time it was rendered. Notwithstanding, we will not rest our decree upon that decision alone. The ground, in our view, is amply supported by authority and the texts of writers. We have before

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us the second edition of the work of Mr. Church on *Habeas Corpus*, from which we quote *in extenso* upon this point, as it has a direct bearing upon the issue here involved:

"In a late California case, the petitioner for a writ of *habeas corpus* had been convicted for killing one Madden. On appeal a second trial was ordered, and after both the prosecution and defence had introduced their evidence, the District Attorney moved the court that the jury be discharged from the further consideration of the case, on the ground that it appeared from the evidence that an offence of a higher nature than that charged in the indictment had been committed. The indictment, as it then stood, was for manslaughter. The court granted the motion, and made an order that the defendant be committed to answer any indictment which might be found against him for murder. On *habeas corpus*, the Chief Justice of the Supreme Court said: 'The order was made by the District Court, the judge of which court is a magistrate vested with authority to hold accused persons to answer—and was entered after hearing the evidence touching the alleged killing of Madden by the prisoner. Whether the order was irregularly entered, was erroneous, or what defence or advantage it may possibly afford the prisoner, should he be again put upon his trial for the killing of Madden, are questions which it is not the office of the writ of *habeas corpus* to present for our consideration.' " Sec. 238.

The facts and the law involved in the cited case are quite similar to the fact and law in the case before us for our determination. We fully agree with the doctrine of the cited case.

In another section the text writer announces: "Neither will once in jeopardy be reviewed or inquired into on a *habeas corpus*. If pleaded and disregarded, it is an error to be corrected by an appeal" Sec. 253.

In the note on the same page we read: "Where there has been a legal jeopardy it is equivalent to a verdict of acquittal, and the proper course for the prisoner to pursue is to move in the trial court for his discharge, as he is entitled to it. *Habeas corpus* is not the proper remedy," citing a number of decisions.

The text writer from whose work we have quoted refers to a Michigan case involving the foregoing principles, also to an Indiana case, Sec. 254; and adds that no authority can be found *in any way countenancing a contrary doctrine*. Sec. *ib.* (Italics ours.)

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The court had the authority to discharge the jury for gross irregularities which would have affected and vitiated the verdict. We refer only to such irregularity as might disqualify jurors for the proper discharge of their duty.

The correctness or incorrectness of the order depends upon the existence of certain facts, upon which the lower court has passed. To correct the ruling *habeas corpus* is not available. The facts are not before us which would enable us to determine whether the jury was discharged without cause, neither was the method followed by the trial judge in the matter of ascertaining these facts before us in proper form for our review of the questions involved.

Great prominence is given to the fact alleged on the part of the defence, that counsel although present in court were not given an opportunity to be heard, or to cross-question witnesses to the irregularity.

This statement as made has met with denial on the part of the respondent.

Be it as it may, in case of the discharge of a jury, in absence of defendant, a much stronger case for defendant than the one before us, it was advanced as correct and as supported by several cited cases that "conceding that the court erred in discharging the jury, and that the alleged error was cognizable in a court of review, it could not be reviewed without the record in the cause was properly before the court of review in such a way "as to give it a revisory power under its appellate jurisdiction." But such an error "is a mere irregularity and should not be reviewed under this writ. It does not affect the question of jurisdiction, and where a court has jurisdiction it is within its power and authority, and is clearly its duty to entertain, hear and determine every question that may possibly or legitimately arise during the progress of the trial to final judgment of conviction or acquittal. The fact, therefore, if it be one, that the court has improperly discharged the jury in the enforced absence of the prisoner does not dispossess the court of its jurisdiction over the cause." Sec. 254.

The fact, even if it be as urged by defendant, can not be invoked by *habeas corpus*, in the absence of a complete record in the cause.

From a well reasoned case we quote: "If the judgment is merely erroneous, the court having given a wrong judgment when it had jurisdiction, the party aggrieved can only have relief by writ of

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error or other process of review. He can not be relieved summarily by *habeas corpus*." People *ex rel.* Tweed vs. Liscomb, 60 N. Y. (Court of Appeals) 570.

There is nothing as we read the article of the Constitution which detracts from the force of the authorities we have cited. The provisions of the article upon the subject are that this court shall have power to issue writs of *habeas corpus* at the instance of all persons in actual custody in cases where it may have appellate jurisdiction. These provisions do not add to the common law remedy by *habeas corpus*. The extent of the application of the writ is not enlarged. The weight of decisions in other jurisdictions regarding the relief it (*habeas corpus*) offers, is not lessened by our Constitution or by our statutory enactment.

The Code of Practice of this State adopts, in effect at least (and does not enlarge), in criminal cases, the functions of the most celebrated Writ in the English law and the constitutional writ in this country. 2 Kent, 28; 3 Cooley's Black. 129. In adopting the substance of the *habeas corpus* act there is nothing in the language of the Art. 822 of the Code of Practice denoting that it was ever designed to trench upon the functions of other writs or upon jurisdiction on appeal.

The "indictment creates a presumption of guilt for all purposes except the trial before the petit jury." Church on *Habeas Corpus*, p. 440 (note).

While under indictment an imprisoned accused is deprived of his liberty under due process of law.

In the case before us the accused is held according to the law of the land.

The discharge of an accused after the evidence has been closed before verdict without necessity operates an acquittal.

On the other hand, the discharge of a jury, rendered necessary for the purpose of justice, does not operate an acquittal.

We do not think we are authorized on this application for *habeas corpus* to vacate the order of the District Judge under which the accused was imprisoned.

It is therefore ordered, adjudged and decreed that the rule *nisi* which issued in the case be discharged and the application for writ of *habeas corpus* denied.

Drew vs. His Creditors.

No. 12,371.

E. C. DREW VS. HIS CREDITORS.

SLAYDEN KIRKSEY WOOLEN MILLS ET ALS., OPPONENTS.

The failure of a party applying for a respite to deposit in the office of the clerk of the court of his domicile, to whom he presents his petition for calling his creditors, a true and exact schedule sworn to by him of all his immovable as well as his debts, warrants the court in rejecting the application. *Phelps vs. His Creditors*, 36 An. 909.

Where a respite has been refused by the court on the ground of defects in the proceedings the cession of property does not follow under the terms of the Code, but the relief sought by applicant is simply denied, and the case terminates. *Id.*

A PPEAL from the Second Judicial District Court for the Parish of Bienville. *Watkins, J.*

J. C. Theus for Plaintiff, Appellant.

Dorman & Dorman, C. A. Reynolds, and W. U. Richardson for Opponents, Appellees.

Submitted on briefs January 23, 1897.

Opinion handed down March 1, 1897.

STATEMENT OF THE CASE.

E. C. Drew presented to the District Court for Bienville parish a petition to which was annexed a sworn list of his assets and liabilities, with names of his creditors, praying that a meeting of his creditors be called for a day fixed, and that after due proceedings there be judgment granting him a respite for one, two and three years from date. Upon this petition an order was granted for a meeting of creditors to be held on the 28th of February, 1896, before the clerk of the District Court, *ex-officio* notary public. The clerk was directed to give all legal notices. J. A. Dorman was appointed attorney for absent creditors, and judicial proceedings against the person and property of petitioner were ordered to be stayed.

The meeting of creditors ordered was held and the *proces verbal* thereof returned on the 8th of May, 1896. The notary closes the *proces*

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verbal with the statement that the total amount of liabilities as shown by list of liabilities on file was twelve thousand four hundred and eighty-five dollars. That the number of creditors was one hundred and nine; that out of this number eighty-four appeared either in person or by proxy; appeared and voted, representing in amount twelve thousand five hundred and seventy-one dollars.

That fifty-four of said votes, representing in amount seven thousand five hundred and eighty-one dollars, voted for "granting the respite," and the balance, or remaining votes, thirty in number, representing the amount of four thousand nine hundred and ninety dollars, voted "against granting the respite."

That the majority of votes cast in number and amount was in favor of the respite as prayed for.

On the 15th of May, 1896, twenty-eight of the creditors who had voted against the respite united in a petition to the District Court opposing the homologation of the proceeding, assigning as reasons:

1. That there was no legal order for the same. That the one granted was inadvertently granted by the court without requiring the plaintiff, Drew, to make a proper legal showing.

2. That the schedule presented was not sworn to and there was no legal affidavit to procure the order of court.

3. There was no legal and proper schedule presented, and fictitious values were placed thereon. All in fraud of the rights of opponents.

4. The parties named as creditors were not all creditors, and a great many of them were not creditors for the amount placed on the list. That there were names placed on the list in order to procure them to vote for the respite.

5. The showing made by the debtor was false and fraudulent, giving fictitious values to his property to make a showing of solvency to procure votes in favor of the respite.

6. The debtor is hopelessly insolvent and not entitled to a respite under the law.

7. He has made false and fraudulent offers of payment to some of his creditors to procure their votes in favor of the respite, and has induced them to do so by promising to pay their debts in preference to the others, or to pay fifty cents on the dollar in cash as soon as the respite was granted, thereby purchasing votes in favor of the respite, all in fraud of the rights of opponents.

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8. Applicant, shortly prior to the filing of his pretended schedule, fraudulently disposed of a great portion of his property and converted the same into money or evidences of debt, with the view of placing same beyond the reach of his creditors, and has not accounted for same in his pretended schedule—all in fraud of the rights of opponents.

9. Applicant has voted and caused to be voted for his respite fictitious claims through which false and fictitious votes the notary returned his *proces verbal* with a majority in number and amount of creditors as being in favor of the respite to the fraud and injury of opponent.

10. That just prior to the filing of the schedule Drew colluded with and procured attachments to be run on his property, based on fictitious claims and claims secured by mortgage and personal securities, collaterals, pledges, etc., for the purpose of forcing his honest creditors into a compromise of their claims at a large discount, and seeing that said attachments would be set aside and dissolved as in fraud of his real creditors filed this petition for a respite for the purpose of getting his property out of the jurisdiction of the court and the reach of his creditors, and especially of opponents.

11. That Drew fraudulently procured votes for his respite by promise of cash settlement in case his respite was granted by paying the expenses of getting up the affidavits and powers of attorney of the creditors to vote for the respite and by giving security to the creditors voting for the respite and by statements made on circulars and private letters sent out by himself and his attorney, giving a false and fraudulent statement of his financial condition.

12. That Drew obtained credit from opponents Preston & Stauffer to the amount of his indebtedness to them, by making personal statement to them of his assets and liabilities, showing him worth, net, twenty-seven thousand three hundred and fifty dollars, said statement having been dated October 10, 1895, which statement was false and fraudulent, Drew being at that time in an embarrassed condition, if not insolvent.

13. That he obtained credit from all of the opponents by means of statements made by him to the commercial agencies (Bradstreet and Dun), showing his assets above all liabilities to be about twenty-three thousand three hundred dollars, which was false, said statement being made during the month of October, 1893.

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14. That it would be against good morals and public policy to permit him to obtain their goods in the fraudulent manner set forth, and then force them to submit to his respite of one, two and three years voted by friendly creditors.

15. That a majority of the *bona fide* creditors in number and amount voting in said meeting was against the granting of the respite—that the Bank of North Louisiana was not a creditor of Drew at the time of the filing of his schedule, or if a creditor for only a small amount. That the claims voted by Mrs. Hobbs, Tooke and Atkins and Windman were not just debts; that they had been extinguished by payment or prescription, if they ever existed. They prayed that the opposition be sustained and the orders granted be set aside. That the meeting of the creditors and proceedings thereon be annulled and set aside. That the debtor be debarred from claiming a respite and he be adjudged insolvent and the respite proceedings be converted into insolvency proceedings, a cession of property ordered and a meeting of creditors be called to elect a syndic.

Plaintiff moved to dismiss the opposition on the ground (1) that opponents were different firms and individuals located in the different States, having no business in common, and their opposition could not be joined or consolidated in one action; (2) because it was filed at Chambers without any order; (3) because the allegations were too vague to give proper notice; (4) it showed no cause of action.

After trial the court rendered judgment sustaining the opposition filed and disallowing the respite asked for; the court further decreed that the applicant, E. C. Drew, was insolvent and ordered him to make a surrender of his property within ten days. It ordered that a meeting of his creditors be held for the purpose of electing a syndic and attending to such other matters as might be necessary in the premises, such as providing for the sale of property, fixing terms of sale, etc. Attorney for absent creditors was appointed and B. M. Manning, sheriff of the parish of Bienville, was appointed provisional syndic. The applicant, Drew, appealed devolutively from the judgment.

The opinion of the court was delivered by

NICHOLLS, C. J. The case before us exhibits forcibly the indefinite and unsatisfactory provisions of our law on the subject of

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respite. Art. 3092 of the Civil Code, while recognizing the right of creditors to make opposition to the homologation of the proceedings of the meeting of creditors, does not specify what the character of the objections to be made should be, nor what judgment should be rendered in the event of their being sustained. The District Court under the evidence reached the conclusion that the estimate placed by Drew upon his assets was too large and that a comparison of their real value with the amount of his liabilities disclosed the fact that he was not only "unable to satisfy his debts at the moment" (C. C. 3084), but that he was actually "insolvent"—that is, "he was in the situation of a debtor who found himself in the impossibility of doing so." C. C. 3556, No. XI. Starting with this premise and acting upon the declaration made in several decisions of this court that in respite proceedings solvency was presumed while proceedings in matters of voluntary or involuntary surrenders were based upon the very reverse theory, the court evidently deduced the consequence that a judgment decreeing a respite in a case where insolvency had been affirmatively shown was utterly inconsistent with the doctrine upon which the whole matter rested. That therefore the court would not be justified in decreeing the respite "even though a majority of creditors in number and amount" should declare in favor of such a judgment (C. C. 3086), when there were opposing creditors resisting on the ground of insolvency. When the court reached this conclusion, it went further—it decided that not only was a respite not permissible, but that the logical outcome of the situation was, that the applicant should be ordered to make a surrender of his property and judgment was rendered accordingly.

Philips vs. Creditors, 36 An. 909, presented features in all essential respects similar to those of the present case. There, as here, the applicant received in favor of his application the vote requisite for obtaining a respite; there, as here, there were opposing creditors resisting, on the ground of the absence of "a true and exact schedule sworn to," and there, as here, the District Court refused the respite, and forced the applicant into a surrender. This Court affirmed the judgment, in so far as it refused the respite, but reversed it in so far as it forced a cession. In the opinion rendered, we said: "The question remains whether the portion of the judgment enforcing the cession and appointing a provisional syndic should be sustained. The Code, Art. 3098, provides: 'when the

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creditors refuse a respite, the cession of property ensues, and the proceedings continue as if the cession had been offered in the first instance.' "

"This is the only warrant for continuing the proceedings as in case of cession. The law grants to a majority of creditors the option of either granting the respite or of refusing it, and therefore gaining the advantage of a cession of property. They have not availed themselves of the last alternative. They have not refused the respite, and therefore, under the express terms of the law, the condition upon which the cession ensues has not arisen. The respite is denied, not by reason of the refusal of the creditors to grant it, but by reason of defect in the proceedings having the effect to invalidate it. By ordering the matter to proceed as in case of cession, we should act without warrant of law, and, moreover, the defective schedule would be as grave an obstacle to the validity of the proceedings as a voluntary surrender or cession as it is to the respite proceeding." (Burden vs. Creditors, 20 An. 1884.)

The decree of the District Court as it stands is a decree for a "forced surrender," inasmuch as the applicant made no offer to make a cession. This judgment was made in the face of a vote of the applicant's creditors according a respite, and therefore necessarily (for the present, at least) a vote in direct opposition to a forced surrender. The court, in our opinion, was without warrant to issue the decree it did at the instance of the opposing creditors. The circumstances and conditions under which a forced surrender can be ordered are specially provided for by law. Had the present proceedings originated with judgment creditors who had issued executions which had been returned "*nulla bona*," and had, at their instance, a meeting of the creditors of the debtor been ordered by the court, as provided for in Sec. 1781 of the Revised Statutes, "to determine whether the surrender of his property shall be made to his creditors," the forced surrender would have been refused "if a majority of the creditors in number and amount opposed the surrender" (see the provisos to the section). The court was in error in holding that it was authorized at the instance of the opposing creditors at the time and in manner and form as their application was made to decree a cession of property. Upon an examination of the record and of the allegations of Drew's petition, which he verified by his oath, we find that he did not deposit, as required

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by the law, in the office of the clerk of the District Court, a true and exact schedule, sworn to by him, of all his movable and immovable property." The averment of his petition which he swore to was this: "Petitioner herewith presents with this petition a 'sworn' list of 'his creditors' and 'list,' as below, of his debts and assets." In point of fact, the list of assets was not sworn to and the assets therein mentioned were, in the opinion of the District Court, overvalued. We are not able to say that its conclusions on the subject of the assets of the applicant were incorrect.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the application of E. C. Drew for a respite be and the same is dismissed, costs of the District Court to be borne by Drew, the applicant; costs of appeal to be paid by the opponents, appellees.

No. 12,421.

STATE EX REL. CHRISTOPHER SINTES VS. N. H. RIGHTOR, JUDGE
CIVIL DISTRICT COURT.

While it is true that the interrogatories propounded under the articles of the Code of Practice are designated as "Interrogatories on facts and articles," it does not follow necessarily from this that all the rules governing interrogatories propounded under Art. 351 should also apply and control those propounded under Arts. 246 *et seq.* It may be that the District Judge would have the "power" to order in some particular case that the garnishee's original answers be made orally in open court, and enforce his order by way of penalty, but this is something other than that a creditor should have an absolute right to require him to take such action and to force him to do so through a *mandamus* when he declines.

APPPLICATION for Writ of *Mandamus*.

Benjamin Ory and B. R. Forman, Jr., for Plaintiff, Relator:

Article 246, C. P., provides: "The party thus made a party to the suit is termed a garnishee."

Article 245, C. P., provides: "A creditor may also annex to his petition interrogatories on facts and articles to be answered categorically under oath by such garnishee."

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Article 351, C. P., provides: "The party propounding the interrogatories may require the party interrogated to answer in open court, and in his presence on the day appointed to that effect by the judge, if the party interrogated reside in the parish where the court holds its sittings."

It is plain that as the garnishee under Art. 248 of the C. of P. is a party to the suit, and as interrogatories on facts and articles, under Art. 247 of the C. of P., may be propounded to the garnishee, and as under Art. 351 of the C. of P., the party interrogated on upon interrogatories on facts and articles may be required to answer in open court that the garnishee *made a party* may be likewise required to answer in open court.

The case of *Petway vs. Goodin*, 12 R. 445, the court decides expressly "that a garnishee can be required to answer in open court, both in case of attachment and in case of garnishment upon *fi. fa.*

In the case of *Peters vs. Gibson*, 11 An. 97, the reason of the law is given, to-wit: That the party has a right to interrogate a garnishee as a witness in open court in the presence of the parties and the judge, the right to compel him to answer in his own language.

In the case of *Derbes vs. Decuir*, 5 R. 491, the court held: "That the answers of the garnishees were properly required to be in open court, if the plaintiff so desired it."

Farrar, Jonas & Kruttschnitt for Respondents.

Submitted on briefs February 6, 1897.

Opinion handed down February 17, 1897.

Rehearing refused April 12, 1897.

ON APPLICATION FOR WRIT OF MANDAMUS.

The opinion of the court was delivered by

NICHOLLS, C. J. Relator avers that he filed in the Civil District Court for the parish of Orleans, a petition against William J. Comerford, asking judgment for forty-eight hundred dollars; that he caused a writ of attachment to issue against him and made

one Brainard Rorison, residing in New Orleans, and the Barber Asphalt Paving Company, a corporation domiciled in said city, garnishees; that the petition and interrogatories, and the citations and notices of seizure were duly and personally served upon the garnishees, and they were ordered by the court to answer said interrogatories under oath and in open court, on Monday, January 4, 1897, and the answering in open court was regularly continued until Monday, January 25, 1897, when the said garnishees, through their respective counsel, objected to the right of the plaintiff to require said garnishees to appear in open court, and, thereupon, the Honorable N. H. Rightor (judge of the court) sustained the objection of said garnishees and rescinded the orders, requiring them to answer the interrogatories in open court, and denied the relator the right to have said interrogatories so answered; to which ruling relator reserved a bill of exception. He avers that it was the ministerial duty of the judge to require said answers to be made in open court, and it was relator's right, under Arts. 246, 247 and 351 of the Code of Practice, and the case of *Petway vs. Goodin*, 12 Rob. 445, and other decisions fixing the jurisprudence of the State, to have said interrogatories answered in open court in order that the truth might be ascertained, and that relator might make use of the answers so obtained in support of relator's demand against Commerford. He averred that neither of the garnishees came within any exception to the law giving relator the right to require said questions to be answered in open court; that it was important for relator, in advance of going to trial, to discover what property rights and credits were in the hands of the garnishees. He prayed that an alternative writ of *mandamus* issue to said judge, commanding him to order the said garnishees to answer said interrogatories propounded to them in open court at an early date to be by him fixed in the presence of relator or his counsel, and that after due proceedings said writ be made peremptory. He prayed for such other orders in the premises as this court would be able to grant and deem appropriate.

A rule to show cause having been served upon the District Judge, he answered. He submitted to the court that the matter did not fall within its supervisory jurisdiction; that relator was fully protected in all of his rights by a right of appeal to the Supreme Court, if, indeed, said order complained of was one subject to review, in any

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form or manner, which he denied. He denied all of relator's allegations, except so far as he specially admitted them. He filed the record of the suit of Christopher Sintes vs. William J. Commerford, which was duly allotted to the division of the court presided over by himself. He declared that said record, including the bill of exceptions reserved by relator, fully and correctly set forth all the facts in reference to the matters and things complained of by relator, except as to such matters as were by him thereafter alleged.

He declared that true it was that the time fixed for the answering of the interrogatories under oath in open court was originally fixed for Monday, January 4, 1897, and that the time to answer was regularly postponed until January 25, 1897, when the proceedings set forth in relator's bill of exceptions took place.

He averred that exercising his best judgment he decided the question whether or not the said answers should be made in open court in the negative, for the reason that, in his opinion, the laws of the State did not authorize an order requiring garnishee to answer in open court, but that the right to such answers in open court was preserved to relator upon a traverse of the written answers to interrogatories on file, if relator should desire to obtain such answers to interrogatories on facts and articles in open court. That his decision of the question was one rendered in the performance of his judicial duties, and was not the performance of a mere ministerial duty, and that the writ of *mandamus* did not lie to compel him to rescind the said order by him rendered. He prayed that the writ asked for be refused.

The bill of exceptions recites the different documents filed and orders given and proceedings had in Sintes vs. Commerford up to the calling of that case on January 25, 1897. It recites that upon that day the garnishees appeared in open court, through their attorneys, and objected to the right of the plaintiff and the court to require said garnishees to answer in open court upon the grounds:

1. That there was no law in any case warranting an order requiring such answers in open court; and
2. That even if there were such law it did not apply to those particular garnishees who were not residents. That thereupon the court, without hearing any evidence, sustained the garnishees in their first objection and rescinded the order of December 15 and 25, requiring said garnishees to answer said interrogatories in open court and denied plaintiff the right to have them so answered.

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Relator relies upon the articles of the Code of Practice, cited in his petition upon *Petway vs. Goodin*, 12 R. 445; *Derbes vs. Decuir*, 5 R. 491, and *Peters vs. Gibson*, 11 An. 97.

An examination of the pleadings in the suit of *Sintes vs. Commercial* shows that the plaintiff filed a supplemental petition to which he annexed interrogatories, which he desired answered by the parties therein named, but that in his prayer asking that the court order them to be answered he did not ask that they be ordered to be answered "in open court." For some reason not explained, the order signed by the judge required the interrogatories to be answered on the 4th of January, 1897, at 11 o'clock. Brainard Rorison on that day filed in court written answers. It does not appear that the Barber Asphalt Company answered at all.

Counsel for defendants press upon us that the suit is an appealable one, and that any erroneous ruling made in the course of the proceedings could be corrected on appeal; that we should not detach a special ruling from the main case and dispose of it by anticipation. The orders which issued in this case were based upon the theory that the right claimed by relator might on examination be found to be an absolute one which, if not granted now, might be entirely defeated by delay, either by the removal of the parties from the jurisdiction of the court or by death. Relator would have presented on this hypothesis a very strong case for exceptional action on our part. In *State ex rel. Chism & Boyd vs. Judge*, 34 An. 1178, where the judge referred a case before him to be tried by a jury, which under the law was triable by the court itself, we said: "A *mandamus* is often sought and obtained to set in motion a judicial officer who is unwilling to proceed with the decision of a cause instituted before his court, the plaintiff therein having an absolute right to a determination of his action in the form and manner prescribed by law. *State ex rel. Leeds vs. Judge*, 32 An. 542; *State ex rel. Cobb & Gunby vs. Judges*, 32 An. 774; *La. Ice Co. vs. State National Bank*, 32 An. 597; *State ex rel. Merchants' Mutual Insurance Company vs. Judges*, 33 An. 1070; *State ex rel. Winter & Hunter vs. Judges*, 33 An. 1096; *State ex rel. Bloss vs. Judges*, 33 An. 1351; *High on Extraordinary Remedies*, par. 250. A distinction is recognized between cases where it is sought by *mandamus* to control the decision of the inferior court on the merits of a cause, and cases where it has refused to go into the merits of a cause and cases where

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it has refused to go into the merits of an action upon an erroneous construction of some question of law or practice preliminary to the whole case, High on Extraordinary Remedies, par. 151). * * * In the exercise of the powers conferred upon it by Art. 90 of the present Constitution, this court feels justified in interfering in the present case, in which, otherwise, the ruling made might prove a denial of justice. Its appealable character is of no significance."

We have on a number of occasions referred to our power under Art. 90 of the Constitution to grant exceptional relief (see *State ex rel. Murray vs. Judge*, 36 An. 578; *State ex rel. Whitney Iron Works vs. Judge*, 44 An. 1091, 1092; *State ex rel. Lehman vs. Judge*, 46 An. 163; *State ex rel. Saizan vs. Judge*, 48 An. 1501.

As the ruling complained of was one made on an issue raised and contradictorily disposed of between the parties in interest, in a case appealable to us, we are to inquire whether the matter, as presented, be of a character such as to call for the supervisory control over the action of District Courts which we only exceptionally exercise in that class of cases.

In *Derbes vs. Decuir*, 5 R. 491, plaintiff was appellant from a judgment rejecting his claim against the defendant on an alleged assumption of the latter of one-half of a sum due to the plaintiff by defendant's father-in-law. The demand was for a sum of over five hundred dollars. Plaintiff claimed that evidence of the promise was to be found in the deposition of one Delahoussaye and resulted from his neglect to answer the interrogatory of the plaintiff in this respect. The precise relation which he (Delahoussaye) occupied in the litigation, the report of the case does not disclose. It would seem, however, that he had been cited into court to answer in open court one or more interrogatories, and that having failed to do so, they were taken for confessed. The Supreme Court held that this order taking the interrogatories for confessed was improvidently rendered. It said: "The neglect to answer would have been sufficient if the interrogatory had been required simply to be answered, but being required to be answered in open court it was the duty of plaintiff's counsel to call on the court to appoint a day for that purpose. This was not done (C. P. 351.) In *Stewart vs. Carlin*, 2 La. 73, we held that "if a party be ruled to answer interrogatories in open court and his opponent does not move for and fix a certain day on which to answer, they will not be taken for confessed if the party interrogated fail to answer.

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In *Petway vs. Goodin*, 12 Rob. 445, plaintiff, who had obtained a judgment against defendant, caused a *fi. fa.* and garnishment process to issue against two defendants. The application to the court was "that each of the garnishees separately and each for himself be cited to appear and answer separately and each for himself annexed interrogatories in open court under oath in ten days from the service thereof." The order of the court was that they "answer the interrogatories as prayed for and according to law." One of the garnishees filed written answers, the others failed to do so. Judgment by default was taken against them, which was subsequently made final, they being condemned to pay each the amount of the judgment, on the only ground that having been cited to answer the interrogatories and having failed to do so they should be taken for confessed. On appeal the court said there was one objection sufficient to cause the judgment to be annulled, an objection that destroyed its very foundation—in fact the only ground upon which it rested. It announced as this fatal objection that no day had been appointed by the court on which the interrogatories were to be answered and declared that this was essentially necessary to have been done. That though the garnishees were found to be in court when the court should fix a day prepared to comply with the prayer of plaintiff's petition, they were not concluded until a day had been fixed, and they had failed to answer. The court was of opinion that although the garnishees were not parties to the original suit, they were properly parties to the controversy that arose between them and the defendant's creditors with respect to the object of the proceeding; that they were parties to the litigation, adversaries of the seizing or attaching creditors and that Art. 351 of the Code of Practice, making no distinction, said: "The parties propounding interrogatories may require the party interrogated to answer in open court," etc.; that there was nothing in Arts. 247 and 263 which dispensed them from answering in open court; that the article did not indicate in what manner the answers should be taken or received, and that the garnishees would have been bound to have answered in open court if a day had been appointed by the judge for that purpose. We have found no other decision of this court bearing upon the question presented for the reason doubtless that it is exceedingly unusual that the answers of a garnishee as originally made should be sought to be forced to

be made in open court. The practice has almost invariably been for garnishees to answer under oath before a notary public the interrogatories propounded to them, to have those answers written out and signed and then filed in the case in which they were asked. Garnishees are generally regarded, until they shall have filed their answers and until a traverse to the same having been made, an issue has been raised between the plaintiff and themselves, in the light of stakeholders rather than "parties" or "contesting" parties.

One of the garnishees (Rorison) has filed written answers to the interrogatories propounded, the other, a corporation (the Barber Asphalt Co.), has taken no action whatever so far as the record discloses.

Article 246 of the Code of Practice authorizes a creditor who suspects that a third person has in his possession property belonging to his debtor, or that he is indebted to such debtor, to make such third person a party to the suit by having him "cited to declare on oath" what property belonging to the defendant he has in his possession, or in what sum he is indebted. The article does not point out the precise manner in which this "declaration under oath" shall be made.

The next article (Art. 247) authorizes the creditor to likewise annex to his petition interrogatories on facts and articles to be answered categorically under oath by the garnishees, but is still silent as to how or in what mode the interrogatories are to be answered.

Article 248 provides for the special case where the creditor has reason to believe that the person to whom he has caused interrogatories to be propounded is "about to depart from the State without having" FILED HIS ANSWERS to such interrogatories. In such a case the creditor may have the party interrogated arrested.

This article shows that it was in contemplation of the lawmaker that the answers should be "filed" in court, not that they should be taken down by the clerk in open court. The person so arrested is declared by Art. 249 to be entitled to be discharged if he immediately, in presence of the court, answer in writing and pertinently the answers propounded to him, and file such answers in the office of the clerk of the court.

It will be seen from this that even where there may be reason to apprehend that the party interrogated is about to leave

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the jurisdiction of the court, the answers may be written and filed.

Article 262 declares that the garnishee who has been cited in a suit must "put in his answer" within the usual delay, declaring "in the same" what property he has belonging to the defendant * * * and if interrogated on facts and articles he must answer under oath clearly and categorically each question put to him touching such matter."

The article does not direct that the answers thus ordered to be "clearly and categorically" made should be made orally in open court.

The articles of the Code which we have cited are found under the special heading of attachment and garnishment. No reference is made to the later Art. 351, nor does this latter article refer back to them. It is true that the interrogatories propounded under all of the articles are designated as "interrogatories on facts and articles," but it does not follow necessarily from this that all the rules governing interrogatories propounded under Art. 351 should also apply and control those propounded under Arts. 248 *et seq.* It may be that the District Judge would have the "power" to order in some particular case that the garnishee's original answers be made orally in open court, and to enforce his order by way of penalty, but this is something other than that a creditor should have an absolute right to require him to take such action, and to force him to do so through a *mandamus* when he declines.

The case at bar is one where the judge having inadvertently given an order when not asked, and having rescinded the same when called to his attention, is sought to be compelled to adhere to his original order.

The case is not one which calls for the relief asked.

For the reasons herein assigned, it is hereby ordered, adjudged and decreed that the order hereinbefore granted be set aside, and relator's application be and the same is hereby rejected.

 No. 12,427.

THE STATE OF LOUISIANA VS. JOHN REED AND ANAIS PARKS.

The verdict of a jury is not vitiated by the misspelling of the word foreman on the indictment or the finding of the jury. *State vs. Sheppard*, 33 An. 1216.

49 704
50 991

49 704
52 626

49 704
115 189

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Act No. 113 of 1876 authorizes the clerk to open a note of evidence so as to show the facts upon which a bill is taken, but the "*Statement of Facts*" therein referred to is directed not to stand "*in lieu of*" a bill, but to be "*annexed to*" a bill of exceptions which it is contemplated should be reserved and filed.

A party jointly indicted with defendant was placed on the stand on behalf of the defendant. On cross examination a confession made out of court by the witness implicating himself (the witness) and the accused was brought to the knowledge of the jury under an acknowledgment by the witness that he had made such a confession. The witness having made this admission the court left it to the jury to say which of the two statements made by the witness was correct.

HOLD: This was error. When the State proposes to impeach or attack the credibility of one of defendant's witnesses by proof of statements made by him out of court, conflicting with those given on the stand, it is the duty of the District Attorney to state to this witness what those prior statements were and when and where made, and inquire of him whether or not he made the same. If the witness acknowledges to have done so, the prior statements so admitted by him to have been made should not be permitted to go to the jury as criminative evidence against the accused.

A PPEAL from the Nineteenth Judicial District Court for the Parish of St. Martin. *Voorhies, J.*

M. J. Cunningham, Attorney General, and *James Simon*, District Attorney, for Plaintiff, Appellee.

Edward Simon for Defendants, Appellants. •

Submitted on briefs March 20, 1897.

Opinion handed down March 29, 1897.

The opinion of the court was delivered by

NICHOLLS, C. J. John Reed and Anais Parks were indicted jointly for murder. A severance having been obtained, Reed was tried and found "Guilty as charged." He has appealed from the sentence of death pronounced against him. The indictment charged that "they" (the parties indicted) "in and upon one Jacques Comeau, in the peace of the State then and there being feloniously, wilfully and of their malice aforethought, did make and assault and him, the said Jacques Comeau, feloniously, wilfully and of their malice aforethought then and there kill and murder."

Defendant moved in arrest of judgment for the reasons:

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1. Because the juror appointed as foreman of the petit jury did not sign the return of the finding of that body with the addition of the word "foreman," but with the addition of words of a different meaning and spelling, to-wit: the words "for-man," or "forman" if joined together.

2. Because the return of the so-called verdict does not couple the name of the defendant with the words "Guilty as charged," his name merely figuring at the top of the back of the document, disconnected with the said finding.

3. Because nowhere in the indictment is the word "unlawfully" used in connection with the crime charged.

4. Because the minutes of the court do not show that defendant was present when he is said to have pleaded to the indictment.

5. Because the court allowed the former District Attorney to assist the newly appointed District Attorney on the trial and have the same carried on the minutes, which was equivalent to an illegal appointment by the court of an Assistant District Attorney to represent the State, when no one had so requested except the District Attorney.

6. Because the term of court at which the so-called verdict was returned on the 15th of January, 1897, lapsed for the reason that the court having adjourned its session on the 23d of January to the following Monday, the 25th of the same month, the presiding judge did not come into court on the 25th to open and adjourn his court to another day, but simply wrote to the sheriff of the parish to adjourn the court on that day from New Iberia, owing to illness. That this course was illegal and unauthorized, said judge having omitted to instruct said sheriff to OPEN said court on said day AND THEN adjourn it, in consequence of which omission said sheriff merely ADJOURNED said court on said day to another day, the 28th of January, 1897, as instructed, *without first opening* the court, which had been closed by adjournment on the 23d instant. That said proceeding was a bar to any further proceeding in the case, and to the passing of sentence upon the defendant.

The court overruled the motion.

The motion in arrest was correctly overruled. The misspelling of the word "foreman," in leaving out the letter "e," is an insignificant fact. The pronunciation of the word was not changed, and besides, in *State vs. Sheppard*, 33 An. 1216, it was held that the ver-

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dict of the jury is not vitiated by the fact that it is signed by the foreman without the usual addition of "foreman" appended to his signature.

The minutes of January 15th show under the title of the present case that "the jury returned into court and through their foreman, Fred. Schmidt, brought and delivered the following verdict, viz.: 'John Reed guilty as charged,' signed Fred. Schmidt Forman, and that on motion of counsel of the prisoner the court ordered that the jury be polled, which being done each juror answered that the verdict of 'guilty as charged,' was his verdict." The verdict might have been rendered orally, and practically it was so rendered independently of the writing. State vs. Sheppard, 33 An. 1217; State vs. Walters, 15 An. 648; State vs. Ross, 32 An. 854.

The verdict as rendered could have referred to no one other than the party on trial at the time. If there had been any possibility for mistake (which there was not), the writing of the name "John Reed" before the words "guilty as charged" fixed beyond question the identity of the person to whom the verdict referred.

There was no necessity for the word "unlawfully" to appear in the indictment. The latter was drawn in accordance with the requirements of Sec. 1048 of the Revised Statutes.

The minutes show that the accused was present in court and pleaded to the indictment.

There is no good cause for complaint that the former District Attorney should have been permitted, at the request of the new District Attorney to assist the latter in the prosecution of the case. The fact that an entry to that effect was made on the minutes did not make the assisting attorney an "assistant District Attorney" by appointment of the judge.

We find in the record, minutes as of the 25th of January, 1897. They read as follows:

"STATE OF LOUISIANA, }
"PARISH OF ST. MARTIN, }
"MONDAY, January 25, 1897. }

"By virtue and in accordance with the following order viz.:

"NEW IBERIA, January 25, 1897.

"*Sheriff David Reese, St. Martinsville, La.:*

"DEAR SIR—Being confined to my bed with fever and unable to

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go to-day to St. Martinsville, you will please adjourn court until Thursday morning, the 28th instant, at 9 A. M. You will cause this order to be spread on the minutes of the court.

“ ‘ Very respectfully,

“ ‘ (Signed) F. VOORHIES,

“ ‘ *Judge Nineteenth Judicial District.*’

“ Which said original order is hereto annexed and made a part hereof. Sheriff David Reese and Clerk of Court William B. Easton, proceeded to the court room, and then and there Sheriff Reese opened and adjourned the court until Thursday the 28th instant, at 9 o'clock A. M.

“ (Signed) WM. B. EASTON,

“ *Clerk of Court.*

“ Approved:

“ (Signed) F. VOORHIES, Judge.”

The judge was authorized to give this order to the sheriff and the court stood properly adjourned by the sheriff acting under it. (Revised Statutes, Sec. 1934.)

We find in the record a “statement of facts” signed by the District Clerk which is declared to “stand in lieu of a bill of exceptions” and which has been treated as such by all parties evidently under the impression that Act No. 113 of 1896 authorized such a statement to be made by the clerk and that being so made a formal bill of exceptions was dispensed with. In this there is error. The act authorizes the clerk to open a note of evidence so as to show the facts upon which a bill is taken, but the statement of facts is directed not to stand “in lieu of” but to be “annexed to” a bill of exceptions which it is contemplated should be reserved and filed. Under a strict application of the rules of practice governing appeals in criminal cases, matters complained of by an appellant when attempted to be brought to our attention in the irregular manner in which this case has been presented would not be considered, but it being one involving life and the statute one only recently enacted, we have, in view of those facts, coupled with the grave character of the errors charged, felt justified in dealing with this as an exceptional one. When the State proposes to impeach or attack the credibility of one of defendant’s witnesses by proof of statements made by him out of court, con-

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flicting with those given on the stand, it is the duty of the District Attorney to state to the witness what those prior statements were and when and where made, and inquire of him whether or not he made the same. If the witness acknowledges to have done so, the prior statements so admitted by him to have been made, should not be permitted to go to the jury as criminative evidence against the accused. This admission should not carry the prior statements to the jury as "substantive evidence" against the prisoner. but on the contrary, the court should specially and expressly caution the jury from giving to it that effect. In the case at bar we gather from the statement of facts that when Anals Parks (who was jointly indicted with Reed) was on the stand as a witness for defendant, a confession made out of court by the witness, implicating the witness and Reed, was brought to the knowledge of the jury under an acknowledgment by Parks that he had made such a confession, and that the witness having made this admission, the court left it to the jury to say which of the two statements made by the witness was correct.

If the confession in question was admissible against the appellant it should have been placed before the jury at a different time and under different conditions.

For the reasons herein assigned it is ordered, adjudged and decreed that the verdict of the jury and the judgment of the court therein rendered be and the same are hereby annulled, avoided and reversed, and it is ordered, adjudged and decreed that this cause be remanded to the District Court for a new trial.

No. 12,346.

SUCCESSION OF MRS. HELEN C. HALEY.

ON MOTION TO DISMISS.

An appeal from the orders of court appointing and confirming a tutrix is not a collateral attack upon such orders of appointment; it is a direct method of reviewing them authorized by law.

ON THE MERITS.

Applications for natural tutorship are usually acted upon as "of course" on the hypothesis there are no conflicting rights. Under Art. 236, C. C., the natural mother is declared to be entitled, under the circumstances therein stated, to be "of right" the tutrix of her child; but though she be entitled to that "of right" she is not necessarily to be appointed as "of course."

49	709
50	843
51	501
51	606
51	1588

49	709
120	54
d120	55

49	709
121	65

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When a child has been unquestionably adopted by a person, as appears from pleadings which admit the fact, the adoption will be held as made not only presumably with the mother's consent, but under the conditions required or permitted by law, and the mother of the adopted child, advised of the death of the adopting mother, and that in her will she had appointed a testamentary executor, under whose control said child should remain during its minority, should not be permitted to obtain an appointment as tutrix, ignoring the adoption and its possible legal results, and the claims and pretensions of the executor under the will.

Since the decision in Tutorship of Upton, 16 An. 175, and Succession of Forstall, 25 An. 430, legislation in respect to adoption has gone forward, and recent adjudged cases will indicate that this court views the rights of adopting parents as having been broadened by that legislation beyond what it was.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Horace E. Upton and Farrar, Jonas & Kruttschnitt for Anatole A. Ker, individually, as testamentary executor and as applicant for appointment as testamentary tutor, for Appellant, cite:

Succession of Hossa, 37 An. 841.

Succession of Vollmer, 40 An. 594.

James B. Rosser, Jr., for Jeannette Prescott, Natural Tutrix, Appellee, cited:

"Succession of Forstall," 25 An. 430, and "The matter of the Tutorship of Ellen Wilson Upton," 16 An. 175; to Art. 256 (274) of the Civil Code; to Succession of Gorrison, 15 An. 27; Succession of Hawkins, 35 An. 591; Nugent vs. Stark, 34 An. 631, and "*In re Fazende & Seixas* praying for a monition," 35 An. 1145.

Submitted on briefs March 18, 1897.

Opinion handed down March 29, 1897.

Rehearing refused April 12, 1897.

The opinion of the court was delivered by

NICHOLLS, C. J. Mrs. Helen O. Taite, widow of Cornelius O. Haley, died in June, 1895, leaving a last will and testament.

In this will the testatrix, after stating that "she had neither

Succession of Haley.

ascendants nor descendants, but that she had an adopted child named Charles Mandeville Taite, aged about eight years," and after making special legacies, declared "that she gave and bequeathed to her said adopted child the balance or remainder of all her estate of whatever nature or description, constituting him her sole and only universal legatee, and appointed Anatole Ker her testamentary executor and detainer of her property and also testamentary tutor of the said child without bond." She declared that during his minority the said child should remain in charge of and under the control of her executor.

Shortly after the death of Mrs. Haley, her will was, upon the petition and prayer of Anatole Ker, probated and ordered to be executed in the Civil District Court, Division "A." Ker then presented a petition in which, after reciting the fact that Mrs. Haley had died leaving said will, that the same had been probated, that he accepted the trust of testamentary executor, that deceased had left property which it was necessary to have inventoried, he prayed that an inventory of the succession be made, and that he be confirmed as executor. An order was granted as prayed for. An inventory was made and Ker qualified as testamentary executor on the 25th of June, 1895. The inventory showed property valued over twenty-four thousand dollars. In October of 1896, a petition was filed in the District Court by Miss Jeannette Prescott, in which she alleged she was the mother of the minor child, Charles Mandeville Taite, who was adopted by the late Mrs. Helen C. Taite, widow of C. C. Haley and who was constituted universal legatee of said deceased by her last will and testament herein probated and ordered executed. That her minor son, Charles Mandeville Taite, was without a tutor; that as the mother of said minor she was entitled to qualify as his natural tutrix and desired to so qualify. That an inventory of all property belonging to her said minor son, or in which he had an interest, in so far as she was informed and believed, had been taken by the testamentary executor of Mrs. Haley and filed herein, and petitioner was willing to accept said inventory for the purpose hereof and to qualify as natural tutrix on the basis thereof. She prayed that after all due and legal proceedings that she be permitted to qualify, and that letters of tutorship be issued to her as the natural tutrix of her said minor son, Charles Mandeville Taite.

On the 29th October, 1896, the judge of Division "A" signed an

Succession of Haley.

order to the effect that petitioner be permitted to qualify as natural tutrix of her minor child, Charles Mandeville Taite, upon the basis of the inventory taken by the testamentary executor of this estate and that letters issue to her upon her taking the oath prescribed by law.

On November, 16, 1896, the court issued an order that Miss Jeannette Prescott be confirmed as tutrix of her minor child above named, and that letters of tutorship issue to her, basing the same upon a certificate of the Recorder of Mortgages that an extract of the inventory of the minor's property and notice of the application for tutorship had been duly recorded in the recorder's office in New Orleans. Letters of tutorship accordingly issued to her.

On November 23, 1896, Anatole Ker filed a petition in Division " A " of the court in which he averred that he had duly qualified as testamentary executor of Mrs. Haley; that her will had been probated and ordered to be executed; that he had been appointed testamentary tutor of the minor Charles Mandeville Taite, the adopted child and sole heir of Mrs. Haley; that he desired to accept said trust and to qualify as such; that by the will he was exempted from giving bond. That one Miss Jeannette Prescott had filed a petition in court unsupported by any proof and without any notice to petitioner, and she had on said petition procured an order qualifying her as natural tutrix of said minor, but that said order so appointing and so qualifying her was erroneous, null and void and improvidently granted. That simultaneously with the filing of the petition he was then presenting to the court, he filed a motion of appeal from the orders appointing and qualifying Miss Jeannette Prescott as tutrix of said minor. He prayed that after due proceedings he be permitted to qualify and that letters of tutorship issue as testamentary tutor of said minor and that an under-tutor be appointed.

On the same day Ker, in his capacity as testamentary executor of Mrs. Haley and an applicant for appointment as testamentary tutor for the minor, applied for and obtained an appeal from the orders complained of. Miss Jeannette Prescott moved in this court to dismiss the appeal on the ground:

1. That appellant was without any appealable interest. That appellee, being the mother of said minor, has been and alone was entitled to be recognized, confirmed and appointed natural tutrix to the exclusion of every other person.

2. That notwithstanding the nomination of Anatole Ker as testa-

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mentary tutor by Mrs. Haley by her last will, said nomination was absolutely null and void, did not and could not deprive appellee of her right to be appointed and confirmed by the court as natural tutrix of her minor child.

ON THE MOTION TO DISMISS.

NICHOLLS, C. J. We are of the opinion that under the circumstances of this case appellant had a sufficient legal interest to appeal. Occupying the position which he did under the will of Mrs. C. O. Haley, she herself holding the relations which she had toward the child, we think it was incumbent upon him to take legal steps to have enforced her last wishes in respect to the minor, if they were legally enforceable. The course adopted by the appellee stood directly in the way of his qualifying as testamentary tutor. We do not consider an appeal from the orders of the District Court, appointing and confirming appellee as tutrix, a collateral attack upon them; it is a direct method of reviewing them, authorized by law. The propositions asserted by appellee, that the appeal is not maintainable, because she, being the mother of the minor, had been and was alone entitled to be recognized, appointed and confirmed as his natural tutrix, and that the appointment of Anatole Ker as testamentary tutor, by Mrs. Haley, was an absolute nullity, because the latter could not deprive the mother of the tutorship, involve questions of fact and law not proper to be determined on the motion to dismiss. Among the points sought to be presented by the appellant, we find it questioned whether appellee was appointed and confirmed under evidence before the court that the person appointed was, in fact, the mother of the child, or if such was the case, that the conditions under which the mother could have claimed the tutorship had been shown to exist. We find it also urged that under the facts of the case, all known to appellee, it was appellant's right to have been made a party to the application for tutorship, and it was appellee's duty to have legally notified him of her intended legal proceedings. We think the answer to these questions should be made, if they can be made at all, upon consideration of the merits.

ON THE MERITS.

Appellee claims that the court must presume, in the absence of an affirmative showing to the contrary, that when the court acted on her application it had before it evidence of all the facts necessary

Succession of Haley.

to have been shown to authorize the order. *Nugent vs. Stark*, 34 An. 631, and "*In re Fazende & Seixas praying for a monition*," 35 An. 1145, are cited in support of this contention. The order was granted upon a petition with no documents annexed thereto and no affidavit as to the truth of the allegations of the petition. It was evidently an *ex parte* order given upon the hypothesis that there were no conflicting rights. Applications for natural tutorship are usually acted upon "as of course" on that supposition, but the party obtaining them, under such circumstances takes the risk of their being appealed from if, in fact, there should be opposing interests. We think the present case of that character. The child in question was unquestionably adopted by Mrs. Haley—appellees pleadings admit that fact. If appellee be its mother the adoption was not only made presumably with her consent, but under the conditions required or permitted by law for adoption. The mother was fully advised that the adopting mother was dead, and that in her will she had appointed Ker as testamentary tutor. With this knowledge on her part we do not think she should have been permitted to obtain an order appointing her tutrix, ignoring the adoption and what were, at all events its possible, legal results and ignoring the pretensions and claims which she must have known Ker could have set up adversely to her claims.

It is by no manner of means clear that the mother would have been appointed tutrix in a contest raised between herself and Ker claiming as a testamentary tutor appointed by Mrs. Haley. It is certainly not sufficiently clear to have been assumed or to be now assumed as an undeniable uncontrovertible legal proposition. It is true that the cases cited in the 16th and 25th Annuals strongly support the views taken on that subject by appellee's counsel, but legislation in respect to adoption has gone forward since those decisions were rendered, and recent adjudged cases will indicate that we view the rights of adopting parents as having been broadened by that legislation beyond what it was.

We note the second section of Act No. 64 of 1868, as declaring that when the person whose adoption is solicited is a minor, the consent of such person's surviving father or mother, or both, if living, shall be required by the judge, and the said father or mother, or both, as the case may be, may, in the act of adoption, surrender the entire parental authority to the person or persons adopting said

minor. What the legal scope of such a surrender may be, we are not now called on to examine or say. We have no knowledge whatever of the facts and circumstances connected with the child. We do not know in whose hands it was prior to Mrs. Haley's connection with it. We do not know who were the parties to the act of adoption, nor what the terms of the adoption were. We know nothing as to what would or would not be for its best interests, as there is no testimony before us. It is true that the natural mother, as a general rule, is declared in Art. 256 of the Civil Code to be entitled, under the circumstances therein stated, to be "of right" the tutrix of her child, but, though she be entitled to that "of right," she is not necessarily to be appointed as "of course." Even the legitimate child is not necessarily to be placed under the tutorship of its father or its mother—the facts of a special case would make it sometimes improper that it should be so placed. What modification Art. 256 may have received in special cases, through special legislation, is an open question.

We have reached the conclusion that justice to all parties requires that the orders of court, appointing appellee natural tutrix of Charles Mandeville Taite, should be annulled and set aside, and that the rights of all parties in the premises be set at large.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the orders of the District Court appealed from be and the same are hereby annulled, avoided and set aside; and it is now ordered that the case be remanded to the lower court for further proceedings according to law, with reservation to both parties of all legal rights in the premises.

No. 12,158.

HOLTON & WINN VS. JOHN A. HUBBARD & CO. ET ALS.

The owner who ships under a bill of lading and hands the bill to his factor may be said to have more or less connection with that instrument when it is subsequently advanced by a third party as the basis of rights predicated by him upon possession of the bill by the factor, particularly if the delivery of the property is directed to be made to the factor or his order. If after the cotton has been received and the bill of lading therefor has fully carried out its purpose of delivery, the factor stores the cotton, takes a receipt for the same in his own name from the warehouse and makes use of the receipts as a basis for credit, the warehouse receipts evidence a contract with which the owner is

49	715
51	880
51	1334

49	715
1124	683

 Holton & Winn vs. Hubbard & Co. et als.

disconnected; it is an original transaction between the factor in his own name and the proprietors of the warehouse to which the owner is not "a party" though he has an interest in the subject matter. It is clear that any contract by which one person attempts to divest another of his property, without the owner's consent, express or implied, or through due process of law, is without force. C. C., Art. 1889. The doctrine which prevails in France that the possession and title of movable property go together (C. N., Art. 2279) has never prevailed in this State, and it certainly was not the intention of the lawmaker in enacting Act No. 156 of 1888 to introduce it now. It was never contemplated by the lawmaker that the mere fact that a factor should be the holder of a warehouse receipt, taken out by himself in his own name, should confer upon parties the right to deal with a factor, and to absolutely ignore, under full protection, the relations which he has to the property and to its owner.

Where the payee of a note after having discounted it in bank under his endorsement, takes it up on the first day of grace, the effect of the payment is to replace in the endorser the title to the note which had passed to the bank under the endorsement and enable him to reissue the note as a collateral as far as third persons are concerned as if it had been transferred by him to them for the first time. A note is not overdue as to the equities until the days of grace have expired and the equities (in the absence of special circumstances) are cut off until then.

ON APPLICATION FOR A REHEARING.

In this case there was no entrusting by the owner of the factor with the *indicia* of title.

From an early period the courts of this State have enforced the principle that the factor could not, for his own debts, pledge the property of his principal, and that such pledge was no impediment to a recovery by the owner.

APPPEAL from the Civil District Court for the Parish of Orleans.
King, J.

James B. Guthrie for Plaintiff, Appellant:

There arises out of the relation of principal and factor an absolute incapacity on the part of the factor to pledge for his own debts (whatever the form in which the pledge is attempted to be made) property consigned to him for sale, unless especially authorized so to do by his principal.

Though a factor may sell and bind his principal, he can not pledge the goods as a security for his own debt, even though there had been warehouse receipts, under Act 156 of 1888, issued to him therefor. Civil Code, Arts. 3142, 3145, 3146, 3158; *Hadwin vs. Fisk*, 1 An. 74; *Avery vs. Gurney*, 17 La. 166; *Bonnoit vs. De Fuentes*, 10 An. 72; *Miller vs. Schneider*, 19 An. 306; *Young vs. Scott*, 25 An. 318; *Stern Bros. vs. Bank*, 34 An. 1121; *Lalande vs. His Creditors*, 42 An. 705; *Allen vs. Bank*, 120 U. S. 83.

Act 156 of 1888 does not repeal any portion of Act 72 of 1876, nor any provision of the Civil Code governing the right of pledge, nor does it alter the settled jurisprudence of this State on the doctrine that a factor can not pledge for his own debt property consigned to him. This statute of 1888 is an act in *part materia* with Act 72 of 1876, and with Act 150 of 1868, and with Art. 8158 of the Civil Code, and all of these acts must be construed with reference to each other. *Bond vs. Hiestand*, 20 An. 140; *Sutherland on Statutory Constructions*, Secs. 283, 284, 287 288, 321 and 322; *McOools vs. Smith*, 1 Black U. S. R. 470; *Potter's Dwaris*, pp. 154 and 156, notes 54 and 55.

The Act of 1888 shows no purpose of legalizing pledges by factors reprobated by the general law, and by well accepted rules for construction this act of 1888 can not be deemed to affirm a factor's pledge as against the owner of the property.

The right of the owner to recover his property where a wrongful pledge has been made by the factor, specially reserved to the owner by section five (5) of Act 72 of 1876, has not been taken away from the owner by Act 156 of 1888.

G. L. Hall, for Plaintiff, submitted a brief.

W. S. Parkerson, *amicus curiæ*, submitted a brief on the same side.

E. T. Merrick joined in a brief filed by *J. B. Guthrie*, asking an amendment of the decree.

Sam'l L. Gilmore, for Hibernia National Bank, Appellee; *Thos. J. Semmes*, of Counsel:

Public warehouse receipts, issued under and in conformity with Act 156 of 1888, are negotiable and transferable by endorsement in blank or by special endorsement and delivery, in the same manner and to the same extent as promissory notes now are, without other formality, and the transferee or holder of such public warehouse receipt shall be considered and treated as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the vendor's lien on agricultural products, and the lien and privilege of the public warehouseman for storage and other warehouse charges. Act 156 of 1888; Act 63 of 1890.

Holton & Winn vs. Hubbard & Co. et als.

Act No. 56 of 1888 is a recognition of the equitable principle that where one of two innocent persons is to suffer a loss, the loss should be borne by the one who, by his conduct, has made the loss possible, and of the commercial necessity for the quick, easy and safe transfer of merchandise. *Lickbarrow vs. Mason*, 2 Dunforth and East Reports, pages 72 and 76; 1 H. Blackstone's Reports, page 358; 6 East Reports, pages 20, 34, 35 and 36; Benjamin on Sales, pages 922, 924, 925, 926, 928 and 929; *Tiedman vs. Knox*, 53 Maryland, 614.

The pledges made to defendant in this case are in due form of law and valid under Act 156 of 1888. Articles 3158, 3159, Civil Code; *DeBlois vs. Reiss*, 32 An. 588; *Auger vs. Vanal*, 31 An. 867; *Martin vs. His Creditors*, 15 An. 165.

The warehouse receipts in this case, purported to be such, specified on their faces the dates of their issuance, the name and location of the warehouse, and the quantity, number and marks of the property stored, and the dates on which the rice was originally stored in warehouse.

The pledges made to defendant in this case are valid under the Act 72 of 1876, the pledgor having, at the date of the pledges, an interest in the merchandise pledged, exceeding the value of the merchandise at the dates of the pledges.

The plaintiffs have affirmed the validity of the pledges made by their factor with the defendant. *Pitts vs. Schubert*, 11 La. 288; *Bonner vs. Poydras*, 2 Rob. 20; *Wennecker vs. Marchand*, 18 La. 147; *Bloodworth vs. Jacobs*, 2 An. 29; *Dunbar vs. Bullard*, 2 An. 821.

Where two persons sue for the recovery of property in which they have a joint interest, the defendant may institute against them, individually, a demand in reconvention. *Halliman vs. Clark*, 4 An. 197; Code of Practice, 375.

Where there is ground for exception to a demand in reconvention, and the plaintiff goes to trial on the merits of the reconventional demand without objection and introduces evidence thereon, the exception is waived. *Irwin vs. Bank of Kentucky*, 5 An. 3; *Arrowsmith vs. Durel*, 14 An. 850.

Members of a planting partnership are ordinarily bound, jointly, for partnership debts, but they may stipulate for a solidary obligation by special contract. *Payne vs. James & Trager*, 36 An. 476.

Holton & Winn vs. Hubbard & Co. et als.

The extension or renewal of a note at its maturity, by substituting a new note with interest, paid in advance, in the ordinary manner of banks, does not operate novation or extinguish the original obligation. *Union National Bank vs. Slocomb*, 34 An. 927; *Rozenda vs. Zabriske*, 4 Robinson, 497.

Payment of a promissory note by an endorser who has an interest does not extinguish the note as to the maker. *Lanata vs. Bayhi*, 31 An. 229; *Saul vs. Nicolet's Executors*, 15 La. 246; *Millaudon vs. Colla*, 15 La. 218; *Wiggins vs. Flower*, 5 Rob. 406

Argued and submitted December 2, 1896.

Opinion handed down February 1, 1897.

Rehearing refused April 12, 1897.

STATEMENT OF FACTS.

Holton & Winn is a planting partnership, domiciled in Calcasieu parish.

J. A. Hubbard was a well-known commission merchant, residing and doing business in New Orleans, in 1893, where he had been thus engaged since 1888, and the bank had known Hubbard as a commission merchant for three or four years.

Holton & Winn consigned to J. A. Hubbard, between the 1st and 9th of December, 1893, a lot of rough rice amounting to one thousand two hundred and fifty-six sacks, which Hubbard received and sold on its arrival (about December 12, 1893), for a net sum, after deducting freight money and commissions, of three thousand six hundred and eighty-two dollars and fifty-one cents.

Holton & Winn subsequently consigned to J. A. Hubbard a lot of rough rice, to-wit: the one thousand nine hundred and sixty-nine sacks involved in this suit.

Said lot of rice was duly received by J. A. Hubbard between the 20th and 31st of December, 1893, and stored by Hubbard in the Rio Warehouse of John Holmes & Co. (public warehousemen under Act 156 of 1888).

Said rice came to New Orleans in ten cars, each car bearing a number.

Early in February, 1894, J. A. Hubbard & Co. and the individual members of said firm surrendered in insolvency.

Holton & Winn vs. Hubbard & Co et als.

Holton & Winn, finding their nineteen hundred and sixty-nine sacks of rice in said warehouse unsold, brought this action to recover same as owners, sequestered the same, and also sequestered the ten receipts issued by the Rio Warehouse above referred to, which ten receipts were found in the possession of the Hibernia National Bank, claiming to hold them by virtue of a pledge made by John A. Hubbard to the said bank as security for the debt of Hubbard to the bank.

The syndic of J. A. Hubbard was made party.

John Holmes & Co. were also made defendants, but the action against that firm was discontinued.

The Hibernia National Bank bonded the nineteen hundred and sixty-nine sacks of rice, and also bonded the said ten receipts of the Rio Warehouse.

Under an agreement of counsel for plaintiffs and the bank, the rice was sold on the 19th of April, 1894, and the proceeds, amounting to eight thousand one hundred and fifteen dollars and fifty cents, after paying all charges, retained by the bank in place of the said rice sequestered by plaintiff, and subsequently bonded by the bank.

The syndic answered, admitting the shipment of rice by plaintiff to Hubbard, as claimed in the petition of plaintiff, and submitted the matter to the court.

The only parties before the court are Holton & Winn, plaintiffs and appellants, and the Hibernia National Bank, appellee, defendant in the original suit, and plaintiff in a reconventional demand set up in the original answer, claiming judgment against the firm of Holton & Winn, as "the holders and owners" of the individual note of W. L. Holton and T. H. Winn, dated March 1, 1893, drawn for five thousand dollars to order of J. A. Hubbard.

The bank in its answer set up that the warehouse receipts were in due form and held by the bank under legal and valid pledge, and claimed the right to sell the rice and appropriate the proceeds toward the payment of the amount due them by J. A. Hubbard.

In a supplemental answer the bank avers that the plaintiffs, Holton & Winn, had furnished Hubbard with the note so that he might discount it with some bank, the agreement being that he would advance them, for their planting operations, the amount of the note, less the discount, he to be reimbursed out of the proceeds of rice which was to be shipped to him.

The Hibernia National Bank, with which Hubbard had had business transactions for several years, and where he was known to the president, with whom the business was arranged, as a general rice merchant, commission merchant and purchaser of rice, discounted the paper.

At the maturity of this note of March 1, 1893, Holton & Winn, not being able to pay the note, requested Hubbard to secure an extension or renewal of the note, and with that end in view, furnished to Hubbard a note dated December 16, 1893, for five thousand dollars, signed "Holton & Winn." This second note was signed in the city of New Orleans, by Mr. Winn, one of the partners.

These ten receipts were issued to John A. Hubbard, and cover the one thousand nine hundred and sixty-nine sacks of rice described in the petition.

These identical one thousand nine hundred and sixty-nine sacks of rice were sequestered by plaintiffs in the Rio Warehouse and these identical ten warehouse receipts were sequestered in the hands of the Hibernia National Bank, same being endorsed by John A. Hubbard, when thus sequestered.

Under an agreement between counsel, the said one thousand nine hundred and sixty-nine sacks of rice were sold and netted, over and above the storage charges and the brokerage paid out of the funds, the sum of eight thousand one hundred and fifteen dollars and fifty cents, which money the bank received not later than May 4, 1894, and that said fund stands in lieu and place of the said rice (R., Agreement, 207; R., Dupre, 34, 35, 36, 37; Certificate of Dupre, 208).

When Hubbard attempted on December 18 and 29, 1893, to effect a pledge of this rice to the Hibernia Bank for his own debts, Holton & Winn were not indebted to Hubbard.

On the 1st of March, 1893, John A. Hubbard offered to the Hibernia National Bank, for discount, a note for five thousand dollars, payable 15th of December, 1893, made by William L. Holton and T. H. Winn to the order of John A. Hubbard, and by him endorsed.

The bank agreed to grant the renewal, but required that the first note upon which Holton & Winn were liable, *in solido*, should remain in its hands as collateral to secure the payment of the second note, which was one at sixty days. This was agreed to, and according to the usual custom of banks in making renewals of paper, Hubbard

Holton & Winn vs. Hubbard & Co. et als.

gave his check to the bank for five thousand dollars, the amount of the note of March 1, 1898, and the bank discounted the second note, passing the proceeds to Hubbard's credit, and also retained the first note under the agreement.

On the 18th of December, 1898, Hubbard applied to the bank for a loan of four thousand eight hundred dollars, offering as a collateral security eight hundred and fifty-three sacks of rice then in the Crescent Warehouse, and one thousand five hundred and thirty-eight sacks of rice then in the Rio Warehouse, represented by public warehouse receipts issued by these public warehouses, in his name and by him endorsed, in which quantity of rice only four hundred and nine sacks of the rice involved in this case were included. The bank made the loan, taking from Hubbard his note at ninety days, payable to the bank, dated December 18, 1898, for the sum of four thousand eight hundred dollars, and, according to its usual custom, required Hubbard to sign a contract of pledge reciting the number of sacks of rice pledged, the names of the warehouses in which it was stored and the date, amount, and the maturity of the note, taking at the same time from Hubbard the warehouse receipts for the rice described in the pledge.

On the 29th day of December, 1898, Hubbard again applied to the bank for a loan of eight thousand six hundred dollars, and made a second pledge of rice, four thousand three hundred and eighty two sacks then in the Rio Warehouse, represented by warehouse receipts in the same manner in which the pledge of 18th December, 1898, was made. In this pledge of 29th December, 1898, the balance of the rice involved in this suit, one thousand five hundred and sixty eight sacks of rice, was included.

The judgment of the District Court was against the plaintiffs and in favor of the Hibernia Bank, maintaining the validity of the pledge made by Hubbard to the bank through the medium of the ten warehouse receipts issued by the Rio Warehouse to Hubbard for the rice, giving the net proceeds of the sale of the rice to the bank and further giving judgment in favor of the Hibernia National Bank against Holton & Winn on their reconventional demand for five thousand dollars and interest.

Plaintiffs appealed.

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The opinion of the court was delivered by

NICHOLLS, C. J. The first question submitted to us for decision is as to the respective rights of the plaintiffs, Holton & Winn, and those of the defendant, the Hibernia National Bank, touching one thousand nine hundred and sixty-nine sacks of rice which were placed on storage in the Rio Warehouse in New Orleans by John A. Hubbard in his own name, and for which John Holmes & Co., the proprietors of the said warehouse, issued ten warehouse receipts.

The plaintiffs allege that the rice in question belongs to them, that they shipped it to John A. Hubbard for sale; that their ownership has never been divested by sale; that Hubbard was without authority to pledge it; that belonging to them, they are entitled to have their ownership recognized and to have the rice delivered to them, and they so pray.

The Hibernia National Bank contest plaintiffs' claims and set up their right to hold the rice; to sell it and to apply the proceeds of sale to the extinguishment of an indebtedness of Hubbard to them. They aver that they are the holders and owners under the endorsement of Hubbard of the ten warehouse receipts which John Holmes & Co. issued for the same; the said receipts having been pledged to them by Hubbard to secure payment of the said indebtedness. They maintain that whatever rights plaintiffs had in the rice originally must yield to those which have become vested in themselves as holders and owners of the receipts. There is no question as to the fact that the rice belonged to the plaintiffs; that it was shipped by them to Hubbard as a factor for sale, and that it had not been sold. It had been pledged through the warehouse receipts given for the same to the Hibernia National Bank to secure Hubbard's individual debt to them. Plaintiffs, in addition to denying generally that Hubbard was authorized to pledge the rice, aver that at the time it was pledged by him to the bank they owed him nothing.

The bank contends that, independently of any question as to whether Holton & Winn were indebted to Hubbard at the time he pledged the receipts and cotton to them, they are protected as holders and owners of the receipts in good faith under Hubbard's endorsement from any adverse claims which could be urged.

The bank's claims are based upon the provisions of Act No. 156 of 1888.

That act is entitled: "An act to define and regulate the business

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of public warehouses and the issue of warehouse receipts; to define and punish violations of this act, and to repeal conflicting laws.”

We make from the act such extracts as bear upon this controversy.

The third section declares that on application of the owner or depositor of the property stored in a public warehouse, the warehouseman shall issue over his own signature and that of his duly authorized agent a public warehouse receipt therefor, to the order of the person entitled thereto, which receipt shall purport to be issued by a public warehouse, shall bear date of the day of its issue and shall state upon its face the name of the warehouse and its location; the description, quantity, number and marks of the property stored, and the date on which it was originally received in warehouse, and that it is deliverable upon the return of the receipt, properly endorsed by the person to whose order it was issued and upon payment of all charges for storage. All such receipts shall be numbered consecutively in the order of their issue, and no two receipts bearing the same number shall be issued from the same warehouse during the same year, nor shall any duplicate receipt be issued except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face “Duplicate;” and provided that no such duplicate receipt shall be issued by any public warehouseman until adequate security be deposited with or to the order of said warehouseman to protect the party or parties who may formally hold the original receipt in good faith and for a valuable consideration.

The seventh section declares that the receipts issued against property stored in public warehouses, as herein provided for, shall be negotiable and transferable by endorsement in blank or by special endorsement and delivery in the same manner and to the same extent as bills of exchange now are, without other formality, and the transferee or holder of such warehouse receipt shall be considered and held as the actual and exclusive owner to all intents and purposes of the property therein described, subject only to the lien and privilege of the public warehouseman for storage or other warehouse charges; provided, however, all such public warehouse receipts as shall have the words “not negotiable” plainly written or stamped on the face thereof shall be exempt from the provisions of this section, and provided further that no public warehouseman shall issue

warehouse receipts against his own property in his own warehouse; but upon sale of such property in good faith, may issue to the purchaser his public warehouse receipt in form and manner as herein provided, which issue and delivery of the receipt shall be deemed to complete the sale and shall constitute the purchaser full owner as aforesaid of the property therein described. Nothing in this last clause shall be construed to exempt the issuer of said receipt for his own goods in his own public warehouse from complying with and being subject in all respects to all the other sections and provisions of this act.

Section 8 declares that a public warehouseman who violates any of the provisions of this act shall be deemed guilty of a criminal offence and upon indictment and conviction thereof shall be fined at the discretion of the court in any sum not exceeding five thousand dollars or imprisoned in the State penitentiary not exceeding five years, or both.

Section 9 declares that nothing in this act shall be construed to apply to private warehouses or to the issue of receipts of their owners or managers under existing laws, or to prohibit public warehousemen from issuing such receipts as are now issued by private warehousemen under existing laws, provided that such private receipts issued by public warehousemen shall never be written on a form or blank indicating that it issued from a public warehouse, but shall, on the contrary, bear on its face, in large characters, the words "Not a public warehouse receipt," in addition to any form of words imposed by laws heretofore in force.

The tenth section declares that all laws or parts of laws in conflict with this act were thereby repealed in so far as they conflicted.

At the time this act was passed there stood upon the statute books a statute bearing upon the subject of cotton press receipts and warehouse receipts, which was approved March 11, 1876, and known as Act No. 72 of that year. The title of the act was: "An act governing the manner in which cotton press receipts, warehouse receipts, or the receipts of other custodians of any property whatever, shall be issued in all cases where such receipts shall or may be used or pledged as collateral security for money advanced or borrowed on faith of the property therein specified, and governing the delivery and disposal of the property for which such receipts may be issued."

The fourth, fifth and eighth sections of that act are as follows:

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"Sec. 4. Parties who may borrow money on the faith of warehouse receipts, representing property in store, shall file their affidavit with the pledgee that such property is theirs, the pledgor's personal property, or that it is the property of some party for whom the pledgor is acting as agent, factor, commission merchant, or in any other fiduciary capacity, and that said party is justly and truly indebted to the pledgor in an amount equal to the value of the property pledged as specified in the warehouse receipt for moneys paid to him or paid by his order and for his account by the party or consignee making the pledge. The cashier of a bank or the secretary of an insurance company, incorporated or working under any law in the United States, or of this State, is hereby authorized to administer the oath contemplated under the provision of this act. Any deviation therefrom shall render the party so deviating liable for the value of the property or any excess in value over and above the amount for which it may be pledged in any manner specified in Sec. 1 of this act, and to prosecution for perjury and also for obtaining money under false pretences.

"Sec. 5. The vendor's lien of five days privilege now allowed in commercial transactions for the payment of the purchase price shall not be affected by the provisions of this act except in case in which a warehouse receipt has been pledged as collateral for money borrowed. The holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt, and no clause of this act shall operate to the detriment or injury of a warehouse receipt to the extent of the value of the property specified, made and issued in accordance with and under the provisions of this act; provided, that where the factor, agent or pledgor may have wrongfully pledged in violation of this act any property, the lien of the owner shall be valid even against the third holder of the warehouse receipt.

"Sec. 8. All warehouse receipts, as by this act provided, shall be negotiable by endorsement in blank or by special endorsement in the same manner and to the same extent as bills of exchange and promissory notes now are."

This act (Act 72 of 1876) had been preceded by Act. No. 150 of 1868, entitled an "Act to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton press, wharfingers and others," from which we copy.

"Sec. 2. No cotton press, wharfinger or other person shall sell or encumber, ship, transfer or in any manner remove or permit to be shipped, transferred or removed beyond his control any goods, wares, merchandise, grain, flour or other produce or commodity for which a receipt shall have been given by him as aforesaid, whether received for storage, shipping, grinding, manufacturing or other purpose, without the written assent of the person or persons holding such receipt.

"Sec. 6. Cotton press receipts given for any goods, wares, merchandise, grain, flour or other produce or commodity, stored or deposited with any cotton press, wharfinger or other person, or any bill of lading given by any forwarding boat, vessel, railroad, transportation or transfer company, may be transferred by transfer thereon, and any person to whom the same be transferred by delivery shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour or other produce or commodity therein specified, so far as to give validity to any pledge, lien or transfer made or accepted by such person, but no property shall be delivered except on surrender and cancellation of said original receipt or bill of lading on the endorsement of such delivery thereon; in case of partial delivery all cotton press receipts or bills of lading, however, shall have the words, "not negotiable" plainly written or stamped on the face thereof and shall be exempt from the provisions of this act.

"Sec. 8. All the provisions of this act shall apply and be applicable to bills of lading and to all persons or corporations, their agents or servants, that shall or may issue bills of lading of any kind or description, the same as if the words 'forwarded and bills of lading' were mentioned in every section of this act.

"Sec. 9. All receipts, bills of lading, vouchers or other documents issued by any cotton press, wharfinger, forwarder, or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by endorsement in blank or by special endorsement, in the same manner and to the same extent as bills of exchange or promissory notes now are.

"Sec. 12. If any commission merchant, agent or other person storing or shipping any goods, wares, merchandise, grain, flour or other produce or commodity in his own name, being in the possession thereof, for or on account of another person, and negotiating,

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pledging or hypothecating the cotton press receipt or bill of lading received therefor and not accounting or paying over to his principal or owner of the property the amount so received on such negotiation, pledge or hypothecation, shall be adjudged guilty of fraud, and upon indictment and conviction thereof shall be fined in a sum not exceeding five thousand dollars, or imprisoned in the penitentiary in this State for a term not exceeding five years, or both."

By the second section of an act entitled "An act relative to pledges," approved March 15, 1855, pledges of movable property could be made by private writing accompanied by actual delivery, and "the delivery of property" on deposit in a warehouse passed by the private assignment of the warehouse receipt so as to authorize the owner to pledge such property. The pledge so made, without further formalities, was valid, as well against third persons as against the pledgors, if made in good faith.

In addition to the statutes which we have quoted having reference to "cotton press and warehouse receipts," there are others bearing upon the special subject of "Bills of Lading" and the effect thereof, which we should read in connection with Arts. 3145, 3146, 3152 and 3158 of the Revised Civil Code, and with Art. 3214 of the Code of 1825, as amended by the act of 1841; in other words, with Art. 3247 of the present Code.

Article 3214 of the Code of 1825 gave to every consignee or commission merchant, who had made advances on goods consigned to him or placed in his hands to be sold for account of the consignor, a privilege for the amount of these advances, with interest and charges on the value of the goods, if they are at his disposal in his stores or in a public warehouse, or if before their arrival, he could show by a bill of lading or letter of advice that they had been dispatched to him, the privilege extending to the unpaid price of the goods which the consignee or agent shall have thus received and sold.

In 1841 the article was amended so that every consignee, commission merchant or factor should have a privilege preferred to any attaching creditor on the goods consigned to him for any balance due him, whether specially advanced on said goods or not, provided they have been received by him, or an invoice or bill of lading had been received by him previous to the attachment.

In 1874 an act was passed by the General Assembly entitled "An

act to enable planters, farmers, merchants, traders and others to pledge and pawn sugar and other agricultural products to merchants, factors and others, and to confer a pledge by the transmission of the bill of lading or carrier's receipt by mail or by the carrier."

By the first section it was enacted that in addition to the privilege now conferred by law any planter or farmer might pledge or pawn his growing crop of cotton, sugar or other agricultural products for advances in money, goods and necessary supplies that he might require for the production of the same, by entering into a written agreement to pledge the same and having the agreement recorded in the office of the recorder of mortgages of the parish where said cotton, sugar or other agricultural product is produced, which recorded contract should give and confer on the merchant or other person advancing money, goods and necessary supplies for the production of the said agricultural product, a right of pledge upon said crop the same as if the said crop had been in the possession of the pledgee, provided that the right of pledge, thus conferred, shall be subordinate to that of the claim of the laborers for wages and for the rent of the land on which the crop was produced.

Sec. 2. When any merchant, factor, or other person has advanced money, property or supplies on cotton, sugar or other agricultural products, and the same has been consigned to him by ship, steamboat, vessel, railroad or other carrier, the said agricultural products shall be pledged to the consignee thereof from the time the bill of lading thereof shall be put in the mail, or put into the possession of the carrier for transmission to the consignee, and the right of pledge shall be perfect, with the right of sale of said property, which shall be fully vested in said consignee with the right to appropriate the proceeds of sale to the payment of the amount due for such advances as may have been made thereon; provided, that nothing shall be so construed as to defeat or lessen the privileges of the laborers and landlords in this State for wages and rent as now existing by law.

Sec. 3. All merchants, factors and others who may have a general balance of account, or any sum of money due them by any consignee (consignor?) or other person sending them cotton, sugar or other agricultural products for sale at the port of New Orleans, or any other town or city in the State, shall have a pledge upon all such property consigned or sent to them by ship, vessel, railroad or other

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carrier from the time the bill of lading or receipt therefor by the carrier is deposited in the mail or given to the carrier for transmission, which pledge shall be perfect with the right of sale of said property, which shall be fully vested in said consignee with the right to appropriate the proceeds of sale to the payment of the amount due such consignee; provided, that nothing herein shall be so construed as to defeat or lessen the privilege of the laborers and landlords in this State for wages and rent as now existing by law.

A comparison of the provisions of this statute with the law then in force shows that it was intended to modify, in favor of the parties in whose interest it was enacted, the existing laws upon the subject of pawn, and to some extent the laws upon the subject of sale. It will be seen that the right of pawn granted was made to cover a growing crop, and that under the law the contract of pawn became perfect and complete and the rights of a pledgee fully vested under circumstances and conditions different from those which would have been necessary prior to the passage of the act. The consignee, commission merchant or factor, who under Art. 3247, up to that time was secured as to payment only by a "privilege," became secured additionally by a "statutory pledge" dispensing with actual delivery, and the bill of lading referred to in that article had its functions widened and extended beyond those which were announced in the article of the Code cited. Merchants and factors occupying the position provided for in the statute, acquired, in addition to a right of pledge, a "right of sale" with "the right of appropriating the proceeds thereof."

The rights and obligations of different parties as holders of "bills of lading" have been made the subject of special legislation at different times, as the statutes which we have cited of 1874, 1876 and 1888 will show.

These rights and obligations, and those resulting from warehouse or cotton press receipts, though alike in some respects, differ materially in others.

In *Lallande vs. His Creditors*, 42 An. 705, we were called on to pass upon the conflicting rights of the owner of certain cotton which he had shipped to his factor under a "bill of lading," and the Whitney Bank, which had made a loan to the factor, secured by a pledge of the "bills of lading," which had been forwarded to the merchant with the consignment of cotton.

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For the reasons assigned, we were of the opinion in that case that the rights of the original owner were not affected by the pledge. He owed his factor nothing at the time of the pledge, and we were of the opinion that the authority of the factor extended no further than selling the cotton, and that the pledge made by him was without effect. The rights of the parties, in that case, were determined upon statutes prior to Act No. 156 of 1888.

We think the claims of the Whitney Bank, rejected as claimants under a "bill of lading," were much stronger than they would have been had the bank claimed under a "warehouse receipt" originating with Lallande as a storer of the cotton. The owner who ships under a bill of lading and hands the bill to his factor may be said to have more or less connection with that instrument when it is subsequently advanced by a third party as a basis of rights predicated by him upon possession of the bill by the factor, particularly if the delivery of the property is directed to be made to the factor or his order. If after the cotton has been received and the bill of lading therefor has fully carried out its purpose of delivery, the factor stores the cotton, takes a receipt for the same in his own name from the warehouse and makes use of the receipt as a basis for credit, the warehouse receipt evidences a transaction with which the owner is disconnected. It is an original transaction between the factor in his own name and the proprietors of the warehouse to which the owner is not "a party" though he have an interest in the subject matter. "No one (says Art. 1889 of the Civil Code) can, by a contract in his own name, bind any one but himself or his representatives, and it is clear that any contract by which one person attempts to divest another of his property without the owner's consent, express or implied, or through due process of law is without force. In France, under Art. 2279 of the Code Napoleon, the possession and title of movable property go together ("Possession vaut titre"). That doctrine has never prevailed here in the past and it certainly was not the intention of the lawmaker in enacting Act No. 156 of 1888 to introduce it now. Counsel's argument leads up directly to that result if the general public be authorized to contract with respect to property covered by warehouse receipts with holders of such receipts, and to be thoroughly protected (if not in bad faith) in their contracts upon a presumption *juris et de jure* that the holders of the receipts are owners of the property, or if not, that they have all the absolute powers

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of owners over it. If a factor, authorized in point of fact to sell or to pledge the property of his principal, makes use of a warehouse receipt in order to vest rights in the pledgee or purchaser with whom he contracts, it may well be that the receipt may carry the property or the possession of the property as against the attaching creditors of the owner, or as against parties claiming rights under other contracts made by the factor in regard to the same property (C. C. 1922, 1923); but it was never contemplated, we think, by the lawmaker that the mere fact that a factor should be the holder of a warehouse receipt taken out by himself in his own name, should confer upon parties the right to deal with a factor, and to absolutely ignore, under full protection, the relations which he bears to the property and to its owner.

We can not for an instant believe that the General Assembly would enact a law which would enable parties to perpetrate fraud. The rule has always been, and it is now, that one person can not pledge the property of another, unless it be with the express or implied consent of the owner (C. C. 3145), and that when tacit consent is depended on it must be inferred from circumstances so strong as to leave no doubt of the owner's intention (C. C. 3146). The law cites as illustrations of cases wherefrom consent may be inferred, the presence of the owner when the contract was made or the delivery of the object pledged by the owner himself to the pledgee. The articles of the Civil Code upon that subject have not been repealed. The mere fact of a transmittal of movable property by its owner to a factor for sale furnishes no reason to the public to suppose that the owner authorized the factor to pledge it, and particularly to pledge it for his own debt.

Defendants say that the plaintiff knew that the rice when received would be placed on storage. That may be true, but it by no means follows from that they knew it would be placed in a "public warehouse," or if placed in a public warehouse that the factor would take out "negotiable" warehouse receipts for the same.

The receipts upon which defendants declare read as follows:

"Negotiable warehouse receipts issued by John Holmes & Co., Public Warehouse Proprietors under Act 156 of 1888.

"OFFICE 128 TCHOUPITOULAS ST.

"No. 6931.

NEW ORLEANS, Dec. 18, 1893.

"Received on storage from John A. Hubbard in the Rio Warehouse, deliverable only on return of this receipt properly endorsed.

" Mark.	ARTICLES.
" Car 18,144.	Two hundred and eight sacks rough rice.
	" (Signed) JOHN HOLMES & Co.,
	" (Endorsed) JOHN A. HUBBARD."

The receipts in this case do not read "deliverable to John A. Hubbard or order," but read "deliverable only on return of this receipt properly endorsed."

In *Lallande vs. His Creditors*, 42 An. 711, the court alluded to the fact that the "bill of lading" declared on in that case called for a delivery to "Lallande" and not to "Lallande or order."

The third section of Act No. 156 of 1888 directs that the receipt under that act should be "to the order of the person entitled thereto," and that it should state that the property covered by it was deliverable upon the return of the receipt properly endorsed by the party "to whose order" it was signed, and the seventh section declares that receipts issued against property "as herein provided for," shall be negotiable, etc.

While we notice this phraseology of the receipts, the views we have expressed do away with the necessity of our commenting upon it.

Defendants contend, however, that granting that their first proposition was not true, yet the rights which they advance in this case are none the less fully sustained, because at the time that Hubbard pledged the rice to them, Holton & Winn were indebted to him, and therefore, as a factor holding in his possession property of the principal consigned to him for sale, and to whom the principal was indebted, Hubbard had the legal authority and right to make the pledge he did. We need not examine into this question, nor determine what the rights and obligations of parties would be, if, in point of fact, plaintiffs were indebted to Hubbard at the time the pledge was made, for the reason we do not find, as a fact, that they were so indebted, but, on the contrary, that Hubbard was at that time indebted to them. Defendants finally claim that the plaintiffs have ratified Hubbard's pledge of the property, by accepting from him, in satisfaction of their claims against him, a transfer of certain stock of the Ivens Manufacturing Company. The record does not bear out that contention. The transfer mentioned was a desperate effort by the plaintiffs to obtain from Hubbard (then on the point of making a surrender of his property) some security for the payment to them of the balance then due them by him on account. The stock

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was worthless, and it was never contemplated by any of the parties that plaintiffs should surrender any of their rights. As said by this court in *Crossley & Sons vs. Louisiana Savings Bank*, 38 An. 87: "Such a transaction would have implied insanity." (See also *Zeigler vs. His Creditors*, ante, p. 144. We now come to the reconventional demand set up by defendants. They sue as the holders and owners of a note dated 1st March, 1893. This note was discounted by the Hibernia National Bank under Hubbard's endorsement. It was shown to have been, in fact, a firm note, though not so appearing on its face. (*Reynolds vs. Swain*, 13 La. 194.) Hubbard, who was to make advances in 1893 to the plaintiffs, informed them that he could utilize their note for that purpose—in himself obtaining money by its discount. It was to assist him in so doing that the note was executed and delivered. It was negotiable in form and discounted by the bank, free from all equities between the original parties. When it was about to mature, Hubbard (the endorser) took it up by his check, drawn on the bank itself. Immediately thereafter, in conformity to a prior understanding between himself and the bank that this should be done, the note was left with the bank as collateral security to secure the payment of a new note executed by Holton & Winn, bearing date December 16, 1893, for the sum of five thousand dollars, payable sixty days after date to the order of John A. Hubbard, which the bank discounted. It is claimed by the plaintiffs that when Hubbard drew his check on the bank for the first note, and that check was by them paid, the note itself was paid and extinguished. That Hubbard being at that time their debtor, and not their creditor, his leaving the note with the bank as a collateral was simply leaving with them a useless piece of waste paper, as it represented no indebtedness due by them to Hubbard.

The trouble with that contention is that Hubbard, when he drew his check on the bank, was an endorser upon the note, and that when after the check was drawn the note was replaced with the bank as collateral, the first note was not yet overdue; that is to say, the days of grace had not yet expired. When Hubbard offered it *de novo* (this time as collateral instead of for discount) the bank was justified in accepting it as such, and took it free from the equities in the absence of special circumstances which would have cut them off. None such are shown. The effect of the payment by Hubbard, through his check, was to replace in him the title to the note, which

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had passed to the bank by its discount, under his endorsement, and enabled him to reissue it, so far as third persons were concerned, as if it had been transferred by him to them for the first time. *Lanata vs. Bayhi*, 31 An. 232; *Millandon vs. Colla*, 15 La. 213; *Saul vs. Nicolet's Executors*, 15 La. 246; *Wiggins vs. Flower*, 5 Rob. 406.

It is true that the fact that a transfer had been made at that late date might have been advanced as a circumstance calculated to throw doubt as to the good faith of a party accepting it, then either as owner or by way of security, had such an issue been made and supported, but *per se* it does not establish bad faith.

In Woods' *Byle on Notes and Bills* (8th edition), page 170; it is stated as a rule of the commercial law that a bill or note assigned in due time on the day of payment is to be considered as assigned before it is due, and *Goodpastor vs. Voris*, 8 Clarke (Pa.), 334, is cited in support of the position that a note is not overdue until the days of grace have expired. In *Pike vs. Smith*, 11 Mass. 38, it was held that a note endorsed on the last day of grace was taken dishonored, the court citing *Staples vs. Franklin Bank*, 1 Met. 43; *Whitwell vs. Bringham*, 19 Pick. 117; *Ayer vs. Hutchins*, 4 Mass. 370; *Sargent vs. Southgate*, 5 Pick. 312; *Portland vs. Maine Bank*, 11 Mass. 204.

The defence set up in *Pike vs. Smith* was usury. We think the rule announced in *Goodpastor vs. Voris* is that generally accepted.

Hubbard having both notes in his possession, the bank had the right to accept the second note as the original obligation, with the first note as collateral, or the first note as the principal obligation and the second as collateral (*Ingram vs. Richardson*, 2 An. 842).

We think plaintiffs entitled to protection against the second note.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment of the Civil District Court be annulled, avoided and reversed in so far as it rejects plaintiffs' demand and prayer to be decreed the owners of the nineteen hundred and sixty-nine sacks of rice referred to in plaintiffs' petition, or subordinates their rights of ownership to the same to any claims or demand upon the same; and

It is now ordered and decreed that the plaintiffs, Holton & Winn, be and they are hereby declared and recognized as the owners of the nineteen hundred and sixty-nine sacks of rice referred to in their petition, stored by John A. Hubbard in the Rio Warehouse,

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in New Orleans, and that they be delivered to them free from any claim upon them by the Hibernia Bank, and that the claims, pretensions and demands of the Hibernia Bank in, to or upon said rice be and the same are hereby rejected.

It is further ordered, adjudged and decreed that the Hibernia Bank do have judgment against, and recover from the plaintiffs, William L. Holton and Thomas H. Winn, *in solido*, the sum of five thousand dollars, with interest at eight per cent. per annum from 15th December, 1893, until paid, but that no execution issue upon the judgment herein in their favor until the note executed by Holton & Winn, the 16th day of December, 1893, for the sum of five thousand dollars, with interest thereon at eight per cent. from maturity, payable sixty days after date to the order of John A. Hubbard and endorsed by him, which is referred to herein and was discounted by the Hibernia Bank under the endorsement of said Hubbard, be produced and surrendered, or until the plaintiffs are fully protected and held harmless against the future appearance of the same.

ON APPLICATION FOR REHEARING.

MILLER, J. The very elaborate and vigorous brief for the rehearing, as well as the importance of this case, has prompted a re-examination.

The proposition that the pledge by the factor for his debts of the property of the principal can be maintained, derives, it is claimed, support from the English factor's act and similar legislation of some of the other States. Our own jurisprudence is distinctly to the contrary, nor do we think the contention for the intervenor is materially assisted by the factor's acts introduced into this discussion. The English act, as we understand it, maintained the pledge by the party intrusted with the bill of lading or warehouse receipt, provided the pledgee had no notice from the documents or otherwise that the party "intrusted" was not the real owner. We must presume "intrusted" in this act has the usual significance. We can appreciate that if the owner intrusts an agent with his property or with the muniments of title creating all the *indicia* of ownership, the owner would be bound by the pledge as he would by any other disposition of his property by the agent, if the transferee was in good faith. In this case there was no intrusting by the owner of the factor with the *indicia* of title; all the owner did was to ship the

rice to the factor for the purposes of sale, and might well be deemed to rely on that limitation the law imposes on the factor's power and of which all who deal with him are by law deemed to be apprised. In those cases where the English statutes apply, the courts of England have held that pledges by factors are not deprived of the protection of the statute, if there is no evidence of bad faith in the pledgee other than knowledge that the pledgor is a factor. That knowledge our law implies in pledges by factors is (see 2 Kent, Secs. 626, 627) repeated in every phase of adjudications presenting the question. The Supreme Court of the United States, in language guarded, it is true, because the question here was not determined, announce their dissent, or at least reluctance to accept the English interpretation, that taking the pledge from a party known to be factor, and to hold property as such is not in itself sufficient to show bad faith in the pledgee. Nor have the New York courts, in dealing with statutes on this subject, similar to the English statute with respect to pledges by factors, been able to maintain factor's pledges upon the English theory that knowledge of his relation or occupation was not enough to charge him with bad faith. *Allen vs. St. Louis Bank*, 120 U. S., p. 37. In none of the New York cases, as we understand them, of factors' pledges was there any other basis to avoid the pledge than the fact it was made by one known to be a factor and was of property of that kind held by him as a factor. See 6 Hill, p. 512, and others cited in 120 U. S., p. 34. We do not therefore perceive that the English statute applying to those "intrusted with warehouse receipts" has any tendency to support the pledge by the factor not intrusted by the owner with the warehouse receipt or other similar *indicia* of title, and whose only function is to sell. Nor in the cases where the English act applies, does the construction of bad faith in the factor accord with the general current of American authority.

The New York factor's act validates pledges by those holding warehouse receipts or bills of lading. That act entirely omitted that portion of the English act which saved the rights of the owner whenever the pledgee knew he was dealing with an agent. Yet under this New York statute their courts have held "it was impossible to hold that the Legislature intended to enable the factor to commit a fraud on his principal by pledging or obtaining advances on the property when the pledgee knew he was dealing with an agent.

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The Missouri factor's act followed the English and the New York act in upholding pledges created on the faith of warehouse receipts or bills of lading endorsed to the holders. The only, or rather the marked difference between the acts was that under the New York act, the pledgee accepting on the faith of apparent ownership was protected, and in the Missouri statute, the protection was to the pledge accepted on the faith of the receipt or bill of lading, duly endorsed. This Missouri act, as the Supreme Court of the United States observed, was not addressed to factors, nor does factor occur in any part of our statutes on which the intervenors rely. The act, said the court, was intended to regulate the issue and pledge of warehouse receipts. It does not seem to us any basis exists to give that statute any effect to protect pledges by factor, greater than that conceded to the New York act by the courts of that State. The act was designed to furnish the method of utilizing produce in warehouse by providing for loans on warehouse receipts, with no special reference to factors. The pledge by one known to be a factor carries a significance by legal implication inconsistent with good faith in the pledgee. Hence the New York courts excluded factors' pledges from the protection of the act. To the extent deemed open to comment, the Supreme Court of the United States announced the same conclusion. This case in the Supreme Court of the United States arose under this Missouri act. The suit was on a note given to the St. Louis factor by his principal, and afterward transferred to the plaintiff bank. The defence was the note had been paid by cotton shipped by the maker to the factor, but instead of applying the shipments to the payment of the note, the factor pledged the cotton for his own debt to the bank. On the validity of this pledge the United States Circuit Court divided, and the question was certified to the Supreme Court of the United States. That court refused to enforce the pledge on the ground of non-compliance with the statutory conditions to create the pledge, but in the opinion occur expressions adverse to the protection claimed to be afforded by the Missouri statute to factor's pledges, and indicating the appreciation the protection was only to *bona fide* endorsers of the receipt. *Allen vs. St. Louis Bank*, 120 U. S. 32, 35, 37, 39. It does not seem to us that these factor's acts give material assistance to the intervenor's pretension, even if we were at liberty to follow the acts.

We have, however, a well defined jurisprudence on this subject.

From an early period our courts have enforced the principle that the factor could not for his own debts pledge the property of his principal, and that such pledge was no impediment to a recovery by the owner. *Stetson, Avery & Co. vs. Gurney*, 17 La. 164; *Hadwin vs. Fisk*, 1 An. 74; *Bonriot vs. Fuentes*, 10 An. 72; *Miller vs. Schneider & Zuberbier*, 19 An. 300; *Young vs. Scott & Cage*, 25 An. 313; *Stern Bros. vs. Bank*, 84 An. 1120; *Lallande vs. His Creditors*, 42 An. 705. Our jurisprudence is based as well on the theory of notice to the pledgee arising from the transaction, as on the broader ground that the factor, with power only to sell, can not pledge, and that no man can be deprived of his property without his consent. It is difficult to hold that a principle so well established and a jurisprudence so distinctly marked, has been completely overthrown by a statutory change hitherto unsuspected, and claimed to have begun more than a quarter of a century ago. It is required by the Constitution that the substantial object of every act shall find expression in the title. The acts relied on are entitled, one "to prevent the issue of false receipts or bills of lading and to punish the fraudulent issue of cotton press receipts. Act No. 150 of 1868; another to define and regulate the business of public warehouses, the issue of warehouse receipts; to punish violations of the act and to repeal conflicting laws. Act No. 156 of 1868; and yet another with less suggestiveness of the purpose now attributed to this legislation, "to give a lien for the price on agricultural products sold in chartered cities. Acts 1890, No. 63. Would any legislator or citizen dream that under such titles it was proposed to displace a limitation of universal recognition on the power of the factor; radically change the contract of principal and agent, and clothe the factor with the power to appropriate for his own uses his principal property by procuring the issue of a warehouse receipt and pledging the receipt. When the factor's pledge was attempted to be supported to the extent now claimed, under the act of 1868, the Supreme Court, discarding the interpretation sought, observed, that if any such purpose was ever designed, the act would fail on the constitutional objection to the title. It does seem to us that without disregarding the constitutional requirement, it would be impossible to sustain these acts for the purposes now claimed, even if we believed that such purpose had been in the legislative contemplation.

The act of 1868, in its various sections, in so far as it is materia

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to this controversy, providing for the issue of cotton press receipts, enacted that the transferee shall be deemed to be the owner of the property so as to give validity to any pledge or transfer created by him. The act of 1888 mainly relied on, we presume, made the receipt of the warehouseman, negotiable, the same as promissory notes, the transferee to be deemed the owner to all intents and purposes of the property, subject only to the storage lien. The act of 1890 gave the lien to the vendor of agricultural products, with preference over all, including the holder of the warehouse receipt. The act of 1890 has, in our view, no sensible influence in this discussion. Of first impression, the acts of 1868 and 1888 seem designed to regulate the issue and pledge of warehouse receipts. Factors are not mentioned. The well defined relation of factor and principal does not seem to have been in the legislator's contemplation, least of all, the intention to disturb it. Can we graft on these acts the displacement of a fixed limitation on his power and the substitution of his right to convert to his own use his principal's property by the simple expedient it is supposed this statute affords. That is the exaction of the argument for the intervenor. The Missouri act, far stronger than our acts, in literal expression, to sustain the interpretation of the factor's power, elicited from the Supreme Court of the United States a dissent from any such construction. Can more be claimed for the Louisiana statutes? In every commercial community there is apt to be a large quantity of property in warehouse awaiting the opportunity for sales. Legislation to facilitate loans on warehouse receipts of such property is of obvious importance. But the natural interpretation of such legislation is, it refers to owners, or those acting for the owner. It would be a strain to infer from such legislation, the legislative authority for the fraud by the factor on his principal, for that character, reason and law attributes to the pledge by the factor for his own uses of the principal's property. We are not called upon, nor do we determine the scope of their acts save in respect to the purpose in hand. We are, however, at liberty to assign, as we have sought to do, the general scope of the acts. The pledge binds the owner who tenders the receipt; it binds the owner who "intrusts" (to borrow the word from the English act) the warehouse receipt or permits it to issue in another name. These instances we give, not as restrictive, but as illustrative. The shipper of rice or cotton to this market is no

party to placing the property in the warehouse or causing the receipt to issue. He gives no assent to the pledge. All that, in this case, is the factor's work. All that the principal has done is to ship his property under the mandate to sell it and remit him the proceeds. What we do hold is that, on no fair construction of the statutes is the proposition capable of support that cotton or rice, or other product, not sent here to be sold, can be taken from the owner by the factor's pledge for his own debts, and that the pledgee from the factor, with the notice the law conveys to him, can hold up any statute as a shield against the right of the owner, whose trust has been abused. Our legislation is in aid of all usual legitimate business purposes, but we more than pause on the other and different construction urged on us in this case. If the pledge is to be supported on the theory the pledgee is not to be deemed apprised of the violation of trust by the factor, the answer is in that significance universally attached to such a pledge. The law presumes that knowledge, and the grounds of the presumption are too obvious to need, and certainly do not require discussion. "The pledgee is bound to know the extent of the factor's power; he may call for the letter of advice, or make inquiry when the factor tenders the pledge, from whence the goods come," is the terse expression of the text-books, repeated in the adjudged cases. 2 Kent, Sec. 9, pp. 62, 67. The burden of inquiry imposed by law is the equivalent of knowledge. In other words, what a man is required to know and can learn, he is presumed to know. Unless, then, we can construe our legislation to sustain pledges of another's property with notice in the pledgee, this pledge can not be maintained. With the most careful consideration, we are utterly unable to interpret legislative acts designed to assist legitimate commercial necessities so as to overthrow long settled principles and sanction what the law deems frauds.

The law is the guide for courts, and fortunately the law is rarely, if ever, repugnant to public interest. We are told, in this case, that public policy requires factors' pledges to be maintained. Under our law the factor can pledge his principal's property to the extent of the factor's advances. Acts 1876, No. 72. The act is to be construed with, and a limitation, if any was needed, on the other acts discussed. If not indebted to the factor and the principal desires his property to be pledged, he can give that direction. What other occasion exists for pledging his property? Is the pledge to be made

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in the public interest, or for the factor's benefit, or for the advantage of his creditors? We fail to appreciate the public policy that requires produce sent to this market for sale should be taken for either the public or any private interest, save that of the owner. Any interpretation of this court based on that kind of public policy does not strike us as calculated to promote any public interest.

No. 12,345.

SUCCESSION OF HARRY D. HAYS.

In an action between an executor and persons who held in their hands succession funds which they had collected, for a balance which the former claimed for the succession, defendants set up in defence an indebtedness as due them by the succession for the amount of certain notes subscribed by the deceased. Deducting the full amount of said notes from the amount in their hands, they prayed that the court order the plaintiff to accept the resulting balance, in full settlement and liquidation of all claims of the deceased or his succession against respondents, and for a judgment in their favor rejecting plaintiff's demand. The executor had, by anticipation, attacked the notes, claiming that they evidenced no personal indebtedness whatever by the deceased, and were good against the fund only up to an amount specified. Judgment was rendered in favor of the succession for the balance as claimed by the executor, and the judgment was satisfied. Defendants subsequently opposed the executor's account, claiming that the judgment had determined simply the extent to which the funds in their hands stood secured by pledge and right of detention, and not the extent of the liability of the succession on the notes. The court sustained an exception of *res judicata*, pleaded by the executor, based on the judgment.

Held, the liability of all parties on all claims between them was fixed and determined by the judgment.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Frank N. Butler for Executrix and Tutrix, Appellee.

Benjamin Rice Forman for Opponents, Appellants.

E. B. Kruttschnitt, amicus curiæ, submitted a brief.

Argued and submitted February 19, 1897.

Opinion handed down March 1, 1897.

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The opinion of the court was delivered by

NICHOLLS, C. J. Mrs. Adele Rodriguez, widow of Harry D. Hays, dative testamentary executrix of the succession of her husband, filed in the Civil District Court a provisional account of the administration, praying that it be approved and homologated. The account showed a balance of eight thousand two hundred and seventy-eight dollars to the credit of the estate. E. Howard McCaleb and George F. Lapeyre opposed the account. They averred that they were the holders and owners of certain promissory notes of Harry D. Hays of the aggregate face value of nineteen thousand four hundred and seventy-two dollars, and of another note of two thousand one hundred and thirteen dollars, of which a description would be found in a list annexed to their opposition; that said notes had been paid in part by the proceeds of the pledge of a certain policy on the life of H. D. Hays, and that there still remained due on said notes the sum of six thousand five hundred dollars; that they had not been put down on the account as creditors of said succession; they prayed that they be recognized as creditors of the succession for said sum (the unpaid balance still due on said notes), with interest, and that the account be amended by placing them thereon as creditors for said sum, and that they be decreed to be paid in due course of administration.

Mrs. Adele Rodriguez answered, as testamentary executrix and as tutrix of her minor children. She averred that the assets of the succession consisted exclusively of the avails of a policy of insurance for fifty thousand dollars, issued by the Equitable Life Assurance Society of the United States, on the life of Harry D. Hays, which policy had been pledged by said Hays to opponents; that after the death of Hays, opponents collected all that said policy called for, to-wit, fifty thousand dollars, and retained the whole of said sum, except three thousand four hundred and twenty-eight dollars, which sum opponents voluntarily deposited in the registry of the court to the credit of the estate; that opponents claimed the balance of the avails of said policy, to-wit, forty-six thousand seven hundred and twenty-one dollars and forty-three cents, as privileged creditors of the estate; that after said three thousand four hundred and twenty-eight dollars had been thus deposited by opponents, accountant as widow in community, as dative testamentary executrix and as tutrix of her minor children, brought suit in the

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Civil District Court to compel them to pay over seventeen thousand four hundred and seventy-nine dollars and eighty-one cents, being the amount then claimed by accountant to have been illegally retained by opponents in excess of the amount that was due them as creditors of the estate and as pledgee of said policy; that in the answer of opponents to the petition so filed, opponents asserted and claimed that as holders and owners of the notes referred to in their opposition, they were creditors of Harry D. Hays for the full amount of said notes, and had a right as such to hold back all they had retained of the avails of said policy; that in said suit opponents' aforesaid claim as creditors for the amount of the notes declared on in their opposition was not only specifically asserted, but said claim was expressly attacked and controverted by accountant and opponents' said claim as creditors for the full amount of said notes was therein finally determined against said opponents, as would appear from the records and judgments of the Civil District Court and of the Supreme Court in the suit entitled Adele Hays, Widow, etc., vs. Geo. F. Lapeyre and E. Howard McCaleb, No. 48,022 of the docket of the Civil District Court, and No. 11,981 of the docket of the Supreme Court; that opponents had voluntarily executed the mandate of the Supreme Court in the above entitled cause by paying over to the estate the amount they were thereby condemned to pay, to wit, the sum of six thousand four hundred and nineteen dollars and ninety-four cents, and by thus voluntarily executing said judgment they were forever estopped from asserting any claim whatever as creditors of the estate, and accountant pleaded the said judgments as *res judicata* as to said opponents.

The District Court sustained the plea of *res judicata* and dismissed the opposition. Opponents appealed.

The judgment of the Supreme Court referred to in the pleadings will be found reported in 48 An. 749 (Adele R. Hays, widow, dative executrix of the late Harry D. Hays, vs. G. F. Lapeyre and E. H. McCaleb).

Opponents contend that the thing demanded and passed upon in the suit just referred to is not the same as that which is involved in the present opposition. Their position is thus stated by their counsel:

"In the former case Mrs. Adele Hays claimed the amount of a policy on the life of her husband for fifty thousand dollars, which

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had been pledged to Messrs. McCaleb & Lapeyre, and which they had collected; that was the object demanded. It is true that they claimed that the pledge had been given to secure the amount of these notes, nineteen thousand four hundred and seventy-two dollars, and that the court held that the pledge was good only to the extent of the amount that Messrs. McCaleb & Lapeyre had paid Mr. Fergus Kernan for them, to-wit: eleven thousand one hundred and seventy-five dollars. But the validity and existence of these notes as obligations of Harry D. Hays, the maker, was not at issue, and no demand was made for a judgment against Hays' succession on these notes. If the object demanded had been the amount of these notes and these notes had constituted the cause of action, the moment the court came to the conclusion that Messrs. McCaleb & Lapeyre had acquired these notes under such circumstances as to put them on inquiry so that they were not entitled to the position of holders of commercial paper acquired before maturity for value, then the inquiry would have been not what Messrs. McCaleb & Lapeyre paid to Mr. Fergus Kernan for the notes, nor what did Mr. Kernan pay to the previous holders from whom he bought them, but what consideration did Hays, the maker, receive for them. The court found as fact that Mr. Kernan had paid less than fifty cents on the dollar for less than nine thousand seven hundred and thirty-six dollars, but how much less does not appear. Nor does it appear that the court inquired into or came to any determination as to the amount received by Hays for the notes. This would have been the question for determination had the object of the demand been the amount of these notes and had they been the cause of action. But the question was the extent of the validity of the pledge of the policy of life insurance. The object demanded was the amount of that policy, and the court held that the "pledge" was valid to the amount that Messrs. McCaleb & Lapeyre had paid on the faith of the pledge, to-wit: eleven thousand one hundred and seventy-five dollars on the notes bought from Kernan, and one thousand and seventy-five dollars on the note bought from Darton. There was no evidence as to how much Darton had given Hays. *Non constat* but that Darton loaned Hays two thousand three hundred and thirteen dollars, and this is the presumption of law. The court did not find the contrary. It made no inquiry as to the amount Hays had received in consideration for any of these notes.

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Their validity or existence as obligations of Hays was not in contestation. The sole question was the extent of the pledge. Although the court found that Mr. Kernan had given the various holders less than nine thousand seven hundred and thirty-six dollars, yet it held that the pledge was good to Messrs. McCaleb & Lapeyre to the amount of eleven thousand one hundred and seventy-five dollars, which they paid Mr. Kernan."

At the time Mrs. Hays instituted the suit which terminated in the judgment in the 48th Annual, Messrs. McCaleb & Lapeyre had collected the amount of the life policy, and they had, after applying the proceeds to the payment of all claims which they conceived they then legally held against the succession of Hays, deposited the amount which they admitted as being the final balance due by them in the registry of the court to the estate. In striking this balance the full amount of the notes which figure in the present opposition was deducted. When the insurance was paid the policy ceased as between the succession and Messrs. Lapeyre & McCaleb to be collateral, and the money in the hands of the latter operated directly as a payment of the claims they held.

The executrix was aware of the theory on which the balance was reached. She disputed the correctness of the payment in full which Messrs. Lapeyre & McCaleb had made of these notes to themselves, and therefore she attacked by direct action the position which they had taken as to the extent of their rights as holders of the notes and sought to recover from them the balance which she asserted would be due by reducing their claim as so based down to what was really and legally due.

In her petition she made a statement of the proceedings connected with all the notes which Hays had given—those which were originally held by Judge Lazarus for his client, and those which were held by Mr. Kernan. She claimed that although both sets of notes appeared on their face to represent a general personal indebtedness of Hays, and would, but for explanation, be payable generally out of any and all funds or property which he then had or might thereafter have, yet in fact they represented no such indebtedness; that from the very commencement it was understood and agreed that the notes were to be, and should be, payable out of the special fund to be collected after Hays' death from the policy; that the "debt" (if such it was to be called) was a debt due by the fund, and not by

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Hays; that although Kernan appeared to be a third holder, for value, of the notes in his hands, such was not his position, he being in truth the original holder of the same; that the present plaintiffs, from their relations to the different parties, knew, or were held to have known, all the facts of the case, and when they purchased the notes from Kernan they held no better right or greater claim upon or under the notes than he did, or certainly not any greater right beyond that which resulted from the amount paid to him for the notes. Having made a statement of the facts of the case and of the legal position of the parties such as she contended them to be, she asserted that even considering the notes as evidencing a claim payable out of a fund, they were not payable to the full amount that the notes called for, for the reason that the contract in reference to payment out of the proceeds of a life policy, made as it was, between the parties, carried with it no legal liability in favor of the holders of the notes beyond the amount of the advances which had actually been made by the parties holding them. She stated a certain amount as being the balance due to the succession of Hays after payment of all the legal claims which the present plaintiffs held as holders of all the notes, and prayed for judgment for that balance.

The present plaintiffs resisted the pretensions set up by Mrs. Hays as executrix. Referring to themselves as being holders of the Kernan and Darton notes they insisted in their pleadings that they had acquired all of the same in good faith, believing them to be valid obligations of Hays and enforceable to their full amount. They denied that there was any understanding to the contrary; they averred that they would never have purchased them had they supposed that Hays had any idea of contesting their validity and declared that they were the legal third holders for value, and that it was immaterial for what price they acquired the same; that they had collected fifty thousand one hundred and twenty-five dollars for the insurance company in payment of the life policy, and that of this amount they had deposited three thousand four hundred and twenty-eight dollars in the registry of the court to the credit of the succession of Hays as the true and just balance due his succession after paying themselves all of the indebtedness and obligations of Hays held by themselves.

The prayer of their answer was "that the court order the plaintiff in the cause to accept said balance in full payment and satisfaction

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and liquidation of all claims of said Hays or his succession against respondents and for a judgment in their favor rejecting plaintiff's demands and for costs and general relief."

The following extracts taken from the opinion of this court on the appeal of that case will show what the court conceived to be the issues before it and what disposition was made of them.

We said: "The complaints relate principally to the notes identified as the Kernan notes and the note held by Darton * * * As to these, it is alleged that they were issued without consideration; that the defendants acquired them with full knowledge of all the circumstances under which they were issued * * *

"It appears of record that the defendants were aware of the extreme illness of the insured Hays, and of the mortal nature of his disease, and that he had no property or resource of any kind save his life policy * * * In the act of compromise annulling the first assignment of the policy by the insured there is reference to the claim here, general in terms, it is true, yet sufficient to excite and put on inquiry. Direct and express notice is not always indispensable to take notes out of the rule of the commercial law and out of the equities. When the circumstances are such as to bring a particular case under the operation of that rule the maker of the note is legally entitled to insist upon its application regardless of actual knowledge on the part of the purchaser of the note." * * * We pass to the next point: "The defendants can not take more than their investments from the life policy. * * * They claim that they were creditors for the whole amount for which the assignment was made and plead the face value of their notes, but, in our opinion, while they had a right to their fee, advances and interest, they are without the benefit of the law applying to negotiable instruments. When a note is made for a special purpose or taken to be collected exclusively from a policy of insurance as under the circumstances of this case, we think it is taken out of the rule which governs negotiable instruments, in so far as relates to the equities.

"The defendants are entitled to their fee, and to all they have advanced, and all they have paid for the claim they hold and interest. Their demand for the remainder after these will have been paid is rejected." The judgment of the court was as follows: "It is ordered, adjudged and decreed that the judgment appealed from be

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reversed, annulled and avoided. It is further ordered, adjudged and decreed that the plaintiff recover judgment for the sum of fifty thousand one hundred and twenty-five dollars, less all amounts paid as transferees of the notes and fee, and that the case be remanded to the District Court, and a judgment be entered in accordance with this decree."

It is apparent that the policy of insurance, the notes, and the relations of parties were so closely connected with each other that we were forced, for the purposes of reaching a conclusion as to the rights and involved obligations, to enter into an examination of and to pass upon each of those subjects. At the point which matters had reached, the mere question as to whether the present plaintiffs had a right of "pledge" or "right of detention" upon the proceeds of the life policy then in their hands played no part except incidentally and indirectly. The real matter at issue was on the one hand the extent of the rights of the succession of Hays in the funds which the plaintiffs here had collected, and on the other, the extent of the claims which Messrs. McCaleb & Lapeyre held against the succession. The parties were directly at issue touching their respective rights and obligations to each other and not merely as to the security for payment which the one or the other might hold. It is very apparent that we adopted the contention made in the former case by the executrix that the notes did not represent a personal indebtedness due to the holders of the same by Hays or his succession, but that they were really obligations due by and payable out of a special fund; that they were obligations which, by reason of the subject matter of the contract from which they resulted and the relations to that contract of the parties to the suit, were not as broad as they appeared to be on the face of the papers which were presented as evidencing them, but reducible to the amount actually advanced by Messrs. McCaleb & Lapeyre to purchase them. When the insurance was collected by those gentlemen their claims upon the notes and the money in their hands merged into each other and became identical to the extent that the fund was liable for the payment of the notes. Had the fund been insufficient to have met this liability and had there been other property in the succession, this property, under the view we took of the situation, it would not have been subject to be drawn against to meet the deficiency. With the disappearance of the fund would have disappeared all liability upon the notes.

Cotton Oil Co. vs. President et als.

We are of the opinion that the District Court took a correct view of the issues which were raised between the parties in the former suit and finally passed upon and adjudicated by this court, and that the judgment which it rendered and which is herein appealed from should be and is hereby affirmed.

No. 12,887.

ST. LANDRY COTTON OIL COMPANY VS. E. H. MCGEE, PRESIDENT,
ET ALS.

It was not intended by the Art. 207 of the Constitution of this State that a mill should be granted exemption from taxation for the production of cotton seed meal, which in fact should be used for food purposes and not as a fertilizer, or contemplated that the assessor or tax collector should be called upon in each case to go into an examination of the *pro rata* actually used for fertilizers or for food purposes.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *G. L. Dupré, J.*

Kenneth Baillio for Plaintiff, Appellee.

E. B. Duquisson for Defendants, Appellants.

Submitted on briefs February 18, 1897.

Opinion handed down March 15, 1897.

The opinion of the court was delivered by

NICHOLLS, C. J. The object of plaintiffs' suit is, to the extent of one-half, to avoid payment of the tax charged against their land, machinery, appurtenances and movables in the parish of St. Landry, based upon an assessment upon the same for the year 1895 of thirty thousand dollars. Relief is claimed upon the ground that while the property assessed is used in the manufacture of "cotton seed oil," it is also used in the manufacture of cotton seed meal, which they declare to be a "fertilizer," and that the value of the "cotton seed meal" manufactured by means of the mill and its appurtenances is about equal to one-half of the value of the other products manu-

factured. It is contended that the property would have been entirely exempt from taxation under Art. 207 of the Constitution, as amended by the election in 1888, were it not for the fact that cotton seed meal (the fertilizer manufactured by them) was not the exclusive product manufactured.

The article of the Constitution relied upon declares that "there shall also be exempt from taxation and license for a period of twenty years from the adoption of the Constitution of 1879 the capital, machinery and other property employed in the manufacture of textile fabrics, leather shoes, harness, saddlery, hats, flour, machinery, agricultural implements, manufacture of ice, fertilizers and chemicals, etc., * * * provided that not less than five hands are employed in any one factory."

Resistance is made to the demand for a number of reasons.

It is contended, in the first place, that the production of "cotton seed meal" is simply one of the results of the employment of machinery in the production of "cotton seed oil." That this latter business, so far from having been looked upon with favor by the framers of the Constitution, was in a marked and emphasized manner discriminated against in Art. 296 of that instrument, in having been therein taken out specially from the list of occupations exempted from the payment of a license tax and placed in respect to such a tax upon the same footing as manufacturers of distilled alcoholic or malt liquors, tobacco and cigars. It is urged that it is not to be readily supposed that encouragement is sought to be given under Art. 207 of the Constitution, as amended, to the production of "cotton seed meal," so long as the discrimination against the production of "cotton seed oil" remains in the organic law. That in view of this fact, we must apply with the utmost strictness the rule that claims for exemptions from taxation are sustainable only when accorded by law in the clearest language.

Defendants maintain further that, although cotton seed meal can be utilized for the purpose of a fertilizer, with good effect, it can not, in strictness, be deemed "a fertilizer." That the primary and exclusive object of its production was not for fertilizing purposes. That it is used as freely (if not more freely) for the purpose of food for animals as it is for the purposes of cultivation.

It is also contended that, while the process through which cotton seed oil is obtained may be *quoad* the oil a "manufacturing" pro-

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cess, it is not one *quoad* the production of the "cotton seed meal"—that the latter article is simply the refuse of the first process and the latter no more to be deemed a process for the manufacture of meal than it is for the manufacture of hulls; the "hulls" and the "meal" being merely unavoidable, resulting incidents or accompaniments of the manufacture of oil—that being the main industry.

We are of the opinion that plaintiff's demand is not well founded.

The article on account of the production of which exemption is claimed is used as much for purposes other than that of a fertilizer as it is for that particular purpose. This being so, the consideration and determination of a claim of exemption in any particular case would involve an investigation into and determination of the question as to what use the product of each particular mill was finally put to. It was not intended that a mill should be granted exemption from taxation for the production of cotton-seed meal, which, in fact, should be used for food purposes, and not as a fertilizer, or contemplated that the assessor or tax collector should be called upon in each case to go into an examination of the *pro rata* actually used for one purpose or the other.

In the case at bar we think it fairly appears that a large part of the product of the mill was used for purposes other than fertilizing.

We are of the opinion that the District Court erred in its judgment.

For the reasons herein assigned it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed; and it is now ordered, adjudged and decreed that plaintiff's demand be rejected, with costs in both courts.

No. 12,841.

STATE OF LOUISIANA VS. DAVID MARTIN ET ALS.

The object of the State in forfeiting appearance bonds is not to enrich itself, but to bring parties who sign such bonds as sureties to a realization of the fact that in doing so, they assume actual responsibilities, which, if not faithfully met, will result in pecuniary loss to themselves; it is to impress upon those parties that suretyship upon appearance bonds is something more than a form.

It will not suffice to set aside a judgment of forfeiture that the accused appears in court under the coercive power of this court at a time too late to be made effective for the purposes of trial at that term. *State vs. Grice*, 11 An. 605.

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A PPEAL from the Sixteenth Judicial District Court for the Parish of St. Helena. *Reid, J.*

Milton J. Cunningham, Attorney General, and *Duncan S. Kemp*, District Attorney (*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

J. A. Reid for Defendants, Appellants:

The object of a recognizance is not to enrich the treasury, but to combine the administration of justice with the convenience of a party accused but not convicted. 6 An. 257; 6 An. 282; 14 An. 446; 10 An. 235.

Where the recognizance has ripened into a judgment the principal is fairly and truly tried and acquitted, the sureties on enjoining the execution against them will be relieved. 8 An. 489; 10 An. 235.

Submitted on briefs January 28, 1897.

Opinion handed down February 15, 1897.

Rehearing refused March 15, 1897.

The opinion of the court was delivered by

NICHOLLS, C. J. On the 28th of September, 1895, one David Martin, as principal, and Levi Branch and W. G. Bates, as securities, executed a bond in favor of the Governor of the State of Louisiana for the sum of three hundred dollars.

The condition of the bond was that if the said David Martin should well and truly appear at the next jury term of the Sixteenth Judicial District Court at the court house, in the town of Greensburg, and there continue from day to day and from time to time during term time, and not depart thence without leave of the court being first had, then the bond was to be null and void, otherwise to remain in full force and effect.

Martin, the principal on the bond, had been indicted on the 30th of July, 1895, for receiving stolen goods, knowing them to be stolen.

On the 16th of November, 1896, the District Court, under Sec. 1082 of the Revised Statutes, entered up judgment *in solido* against the principal and sureties for the amount of the bond by reason of breach of its conditions.

State vs. Martin et als.

On the 21st of November the defendant, David Martin, suggesting to the court that he was then in jail, and that the jury had not been discharged, prayed that the judgment forfeiting the bond be set aside.

On the same day the sureties appeared and also prayed that the judgment be set aside. They averred that they did not know of the absence of the accused on Monday or Tuesday of that week; that he was not absent by their procurement or consent; that they were by no means to blame; that the accused was then in custody and the jury had not been discharged.

After hearing evidence the court overruled the motion to set aside the judgment.

Defendant on his motion was granted an appeal. The sureties did not appeal.

The evidence shows that on Monday, November 6, 1898, the defendant, Martin, was called for arraignment—that he pleaded not guilty and asked for trial by jury. That his case was fixed for trial for Monday, November 16. That the case was called on that day and defendant did not answer. That his securities were then called on to produce his body in open court instantler. That Branch, one of the securities, when called answered to his name. That the other surety made no appearance whatever. That neither produced the body of the accused and neither of them made any effort to have him appear for trial either then or at any future day. That Martin was in Greensburg (the parish seat) on the day the case was fixed for trial, but did not appear at the court house. That an order for his arrest issued returnable on November 20 and that on that day (in the afternoon) the sheriff returned that he had the accused in open court. That the court was then engaged in the trial of a criminal case and that within a few hours afterward the jury was discharged for the term. Defendant asked for no assignment of the cause. Some of the witnesses for the State lived in other parishes and it was practically impossible to have tried it at that late date. The judge so declared and assigned that as one of his reasons for discharging the jury. The next day (the last of the term) the securities moved to set aside the judgment of forfeiture on the grounds stated.

Article 1082 of the Revised Statutes, referring to the judgment so rendered upon a bond, declares: "The judgment so rendered may at any time during the same term of the court for all the parishes of

the State except the parish of Orleans * * * be set aside upon the appearance, trial, conviction and punishment of the defendant or party accused. Such judgment shall not be rendered in case it shall be made to appear to the satisfaction of the court, by the evidence of one or more credible witnesses, that the defendant or party accused is prevented from attending by some physical disability existing at the time."

The next article (1088) is as follows:

"The appearance and answer of any defendant or party accused, upon call made as provided in the preceding section (Sec. 1082), shall not operate as a discharge or release of any surety from his responsibility, and no such surety shall be discharged or released from his responsibility until the final trial and conviction or acquittal of such defendant or party accused.

"Any surety may be relieved from responsibility by making a formal surrender of the defendant or party accused to the sheriff or his deputy in open court, or within the four walls of the prison of the parish, and not otherwise."

It is not claimed on the part of appellants that the accused was prevented from appearing by reason of any physical disability. No reason at all is assigned for his non-appearance on the day fixed for trial. The fact relied on for setting aside the judgment is that the accused is now in the parish jail.

The term of court at which the bond was forfeited ended on November 21, 1896. The accused has not been tried, convicted and punished.

He was on November 20 produced in open court in the parish of St. Helena, but the record does not show that he voluntarily appeared or that he was surrendered by his sureties; on the contrary, we infer from the minutes that he was produced by the sheriff in arrest under the order of arrest which had issued from the court. It is not claimed that his confinement in the parish jail was under any action of the sureties.

The State does not pretend that there was any collusion between the accused and his sureties that the accused was to fail to make an appearance on the day of trial. Evidence on that subject is immaterial in this case.

In State vs. Williams, 37 An. 202, the judgment of forfeiture of an appearance bond was set aside on an appeal taken by the sureties on

the bond from a judgment of the District Court refusing to do so. The court said: "The sureties brought the accused in open court and offered him for trial. The object of an appearance bond is to secure the trial of offenders rather than to fill the coffers by forced contributions from sureties. That object was attainable through and by the action of the offender at the term when he was called. Where there is no collusion nor suspicion of collusion to defeat the ends of justice, sureties have always been relieved from a judgment of forfeiture. When they have produced their principal and surrendered him into the custody of the law."

In *State vs. Gulce*, 11 An. 605, where a judgment forfeiting an appearance was unsuccessfully sought to be set aside in the District Court and an appeal was taken against such action by the sureties, the Supreme Court affirmed the judgment. The ground upon which the appellants claimed that the judgment should be set aside was that the accused appeared at the same term of the court at which the bond was forfeited and demanded a trial, which was refused by the court, because the jury had been discharged for the term. The facts in that case were very similar to those in the present case, and we are of the opinion that the views therein expressed by the court are correct. We are satisfied that the accused designedly evaded a trial. When he did appear in court it was not of his own accord or through the instrumentality of his sureties, but through that of the sheriff, under the coercive process of the court, which, resulted, as the record discloses, in an appearance (if it can be properly so-called), too late to be made effective for the purposes of a trial at that term.

We do not think the object of the State in forfeiting appearance bonds is to enrich itself, but to bring parties who sign such bonds as sureties to a realization of the fact that in doing so, they assume actual responsibilities, which, if not faithfully met, will result in pecuniary loss to themselves. It is to impress upon those parties that suretyship upon appearance bonds is something more than a form. If we were to accede to the proposition that the circumstances shown by the evidence disclose a proper case for setting aside the judgment of forfeiture, there would be no reason why the same condition of affairs should not arise at the next term of court, and the accused party again trifle with the administration of justice. The sureties in this case evidently acted upon the mistaken idea and

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conclusion that they had no affirmative duty whatever devolving upon them in the premises.

It is true, the accused was in the parish jail when the motion to set aside the judgment was made, but he was there, as we have seen, through no act of the sureties, but after he had defaulted upon his appearance and the judgment of forfeiture had been rendered.

We think the judgment appealed from was correct, and it is hereby affirmed.

No. 12,347.

EDMOND H. CHADWICK AND ANOTHER vs. THE GULF STATES LAND
AND IMPROVEMENT COMPANY.

A decree enjoining a person from reasserting title to the property involved is in reality one decreeing the plaintiff to be the owner of the same, though it may not so declare in express terms. *Heirs of Delogny vs. Mercer*, 48 An. 209.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

George L. Bright for Plaintiffs, Appellants.

E. Howard McCaleb for Defendants, Appellees.

Argued and submitted February 19, 1897.

Opinion handed down March 1, 1897.

STATEMENT OF THE CASE.

The plaintiffs in this suit are Edmond H. Chadwick and Mrs. Elizabeth Johnson (widow of William S. Gilman); the defendants are the Gulf States Land and Improvement Company, and Domingo Negrotto, Jr.

The petition alleged on behalf of Mrs. Gilman that she was, on and after the 21st of March, 1879, and up to the 3d of November, 1891, the owner of certain described property; that she sold said property on the 3d of November, 1891, to Edmond H. Chadwick, and transferred to him all her right, title and interest in and to the rents and revenues of five houses in said property, from July 27, 1889, to

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November 3, 1891, and she represented in the act of sale that she was seized of said premises in fee simple and had a right to convey the same, and promised and obligated herself to deliver possession thereof to her vendee; that since the 21st of October, 1891, and until the present time, Domingo Negrotto, Jr., and the Gulf States Land and Improvement Company had illegally and wrongfully taken possession of said property and had deprived the plaintiffs of the possession, use and benefit of the same and continued to keep said possession and claimed to be the owners of the same; that they had collected the rents of said property, which had been and were still of the value of twenty dollars per month; the rents they so collected from 27th July, 1889, to November 3, 1891 (between the date they took possession and the date when Mrs. Elizabeth Johnson transferred the property to Chadwick), being five hundred and sixty-four dollars and sixty-two cents, and those from November 3, 1891, to September 6, 1896, being one thousand one hundred and sixty dollars. The petition alleged, in behalf of Chadwick, that by the act of sale from Mrs. Elizabeth Johnson (Mrs. Gilman) to him she obligated herself to deliver said property to him and to put him in possession thereof; that he acquired the property as stated in the petition and acquired also the right, title and interest in and to the rents and revenues of the five houses on the property from July 27, 1889, to November 3, 1891, the day of his purchase, which rents then amounted to five hundred and sixty-four dollars and sixty-two cents; that Domingo Negrotto, Jr., and the Gulf State Land and Improvement Company were further indebted to him for the fruits, rents and revenues of said property from the day he purchased it (3d November, 1891) until they should deliver possession to him at the rate of twenty dollars per month, the sum due up to 3d September, 1896, amounting to one thousand one hundred and sixty dollars; that he had been damaged by the wilful, wrongful, illegal deprivation of his property and the violation of his legal rights in the sum of one thousand dollars.

The allegations made by Mrs. Elizabeth Johnson were adopted and reiterated. In view of the premises, plaintiffs prayed that there be judgment, recognizing that Mrs. Elizabeth Johnson (Mrs. Gilman) was the owner of the property on the 21st of March, 1879, when she purchased it from Thomas Pickles, up to November 3, 1891, when she sold it to Chadwick; that Chadwick is now the owner of the same; that judgment be rendered *in solido*, decreeing that the de-

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fendants have no right, title or interest in said property, and ordering them to deliver possession thereof to petitioners and pay them the sum of five hundred and sixty-four dollars and sixty cents, with legal interest thereon from November 3, 1891, and the further sum of one thousand one hundred and sixty dollars, with legal interest from September 3, 1896 (date of judicial demand), and the further sum of twenty dollars per month, until they deliver possession of said property, and the further sum of one thousand dollars with legal interest from judicial demand.

The defendants excepted to plaintiff's demand.

1. There was a misjoinder of parties, plaintiff and defendant, in the suit.

2. Plaintiffs' petition disclosed no cause of action.

3. Plaintiffs were estopped from prosecuting the suit for the reason that in the case entitled "Gulf States Land and Improvement Company vs. E. H. Chadwick, No. 34,819 of the docket of the Civil District Court, Division 'C,'" subsequently appealed and affirmed by the Court of Appeals for the parish of Orleans, all the matters and things herein involved were finally decided and the judgment rendered in said cause constitutes the authority of the thing adjudged and operates as a perpetual bar to plaintiffs' demand.

4. That in the case of E. H. Chadwick vs. Gulf States Land and Improvement Company, No. 12,103 of the United States Circuit Court for the Eastern District of Louisiana, and No. 405 of the United States Circuit Court of Appeals for the Fifth Circuit and Eastern District of Louisiana, all the matters and things herein involved were finally adjudged against said plaintiff, and defendants pleaded said judgment so rendered in said cause as *res judicata* to plaintiff's demand; that the court was bound to give effect to said judgment so rendered by the United States Circuit Court of Appeals and recognize the validity of the same under the Constitution and laws of the United States. The District Court sustained the plea of "*res judicata*" and rejected the demand of the plaintiffs. They appealed.

On January 25, 1892, the Gulf States Land and Improvement Company brought suit against Edmond Chadwick in the Civil District Court for the parish of Orleans. Petitioners alleged that they were the owners of the property in the city of New Orleans claimed by plaintiff. They prayed that Chadwick be cited to appear and answer the petition; that after due proceedings there be judgment in petitioners' favor protecting them in their possession of the property, and forever enjoining the defendant from disturbing said possession or enjoyment by slander, actual, intrusive or otherwise; that their title be recognized as valid and that Chadwick be ordered to secure the cancellation of the inscription of his pre-

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The opinion of the court was delivered by

NICHOLLS, C. J. We direct our attention, first to the judgments rendered by the State courts. The action brought there by the plaintiffs, the Gulf States Land and Improvement Company, was one known in law as an action of jactitation or slander of title.

Livingston vs. Heerman, 9 Martin (O. S.), 713, was an action of that kind. The jury rendered a verdict in favor of the plaintiff for the land referred to in the plaintiff's petition, and judgment having been rendered accordingly, defendant appealed. On appeal, counsel on his behalf said: "Defendant, though he had asserted his right to the

tended title from Mrs. Elizabeth Gilman, from the records of the Conveyance Office.

The defendant, for answer, first pleaded the general issue. Further answering, he averred that he purchased property from the owner for seven hundred and fifty dollars, in entire good faith; that prior to said purchase, and prior to the execution of any pretended deed to the plaintiffs, he, defendant, went to Negrotto for the purpose of effecting a compromise; that Negrotto seemed favorably disposed and informed him that a compromise was generally effected on the basis of one-third of the assessment of the property; that then the defendant in good faith purchased said property from the owner thereof and returned again to the said Negrotto, fully intending to arrange and compromise the matter with him in an amicable manner; that on his second visit to Negrotto he was received in an unfriendly and uncomplaising manner, and that even after the institution of the then pending suit he went again to Negrotto, but was unable to compromise. He averred that his said purchase and the inscription thereof constituted no slander of title to any property owned by the plaintiffs, and he specially denied that the plaintiffs had been damaged in any sum whatever.

The District Court, on the 27th of June, 1892, rendered judgment in favor of the plaintiffs and against the defendant, ordering, adjudging and decreeing "that there be judgment in favor of the plaintiffs, the Gulf States Land and Improvement Company, and against the defendant Edmond H. Chadwick, maintaining said plaintiffs in their possession of the property, described in their petition; enjoining said Edmond H. Chadwick from disturbing said possession by slander of title, actual, intrusive or otherwise, and directing that said Edmond H. Chadwick cause to be canceled from the records of the conveyance office the inscription and registry of his pretended title from Mrs. Elizabeth Gilman of the property in question, otherwise that the same be canceled at his expense." It was further ordered, adjudged and decreed that said Edmond H. Chadwick be condemned to pay to plaintiffs, the Gulf States Land and Improvement Company, the sum of one hundred dollars, as damages and costs.

Defendant moved for a new trial on the following grounds:

"1. The judgment was contrary to the law and the evidence.

"2. The evidence showed that plaintiffs had no title, and that defendant had a good title.

"3. No damages were proved and no malice shown, and the judgment for one hundred dollars damages was erroneous.

"4. The judgment ought to have dismissed plaintiffs' suit and quieted defendant in his title, without remitting the parties to further litigation."

The court refused the rehearing, assigning as its reason that "it considered that the issues presented in the rule for a new trial had been previously disposed of and the judgment rendered should remain undisturbed."

Defendant appealed to the Circuit Court of Appeals. That court on appeal amended the judgment by allowing plaintiffs the sum of two hundred and fifty dollars as damages, but otherwise affirmed the judgment.

Subsequently, Edmond H. Chadwick brought in the Circuit Court of the United States, at New Orleans, a petitory action for this property against the Gulf States Land and Improvement Company.

On the 31st of May, 1891, judgment was rendered in the case in the following terms:

"By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged and decreed that there be judgment in favor of the defendants, Gulf States Land and Improvement Company, and against the plaintiff, E. H. Chadwick, dismissing this suit with costs."

Plaintiffs having appealed from this judgment to the Circuit Court of Appeals, the judgment was by that court affirmed.

batture, does not in his answer claim anything more than to be dismissed. He denied the right of the plaintiff to the twenty thousand dollars damages for the alleged slander of title, but does not pray for anything in his favor. It is then most incorrect and unfounded on the part of the plaintiff's counsel to say that if the jury's verdict could have warranted it, judgment might have been awarded in favor of the defendant, to recover that which he does not pray may be granted him * * * for these reasons the court, disregarding all which occurred at the trial, ought to decree that the defendant (Heerman), as is prescribed by the *Partidas*, shall bring his suit within a specified time for the purpose of ascertaining by the judgment of a competent tribunal his rights to the property of which he has asserted himself to be the owner." Mr. Justice Porter, as the organ of the Supreme Court, commenting on the position taken, said: "It is contended by the law in virtue of which this action is brought, the only judgment which the court can pronounce is to decree that Heerman shall bring suit. Little can be gathered from the books as to the particular practice adopted in Spain, in cases of this kind. The law, par. 3, title 2, 146, declares that no person can be compelled to bring suit except in particular cases, wherein the judge may by law, oblige him to do it; as when a man publicly says that another is his slave, etc. In these and like cases the person injured may petition the judge to oblige the defamer to bring suit and prove what he has said or to retract or to make such reparation as the judge shall deem just; if he refuses to bring the suit the party aggrieved shall be forever absolved from the charge made against him.

"The law applies according to the Spanish authority to defamation respecting property, as well as person, and that whether it be movable or immovable. Gregorio Lopez on the above cited law No. 2; *Elizando Practico Universal*, Vol. 2, p. 136. Now when a suit is commenced like the present is the defendant should do one of two things, either deny that he has said so, which would amount to a waiver of title, or admit the accusation, and aver his readiness to bring the suit. In the first alternative this court would proceed to try the fact whether he had defamed the title or not, and give damages accordingly. In the second they would order suit to be commenced. This it appears to me is the regular course. The object of this law was to protect possession; to give it the same advantages when disturbed by slander as by actual intrusion. To force the

defamer to bring suit and throw on him the burden of proving what he asserted. If this course had been pursued here, Heerman would have been directed to bring suit (in the language of the law) to prove what he said; and the plaintiff relying on possession would have been maintained in it until a better right was shown. Instead of doing this he has chosen to maintain the truth of what he has averred by setting forth his title in the answer and averring it to be a better one than the plaintiff's. Having done so I think the court can examine it as well in that answer as if set forth in a petition; it is only, in fact, anticipating the order which the court must have given, and coming forward at once with that title which the court would have directed him to produce in another suit. His adopting this course, at his own choice, can not change the mode in which the proof must be adduced; he must make out his title alleged and can not take from the plaintiff the advantage which he derives from his possession by varying the form in which he has thought proper to make good his claim to the premises. If it should appear that he has a title for the premises, I have no doubt that we can decree that he has not slandered the plaintiff's title; that he has a better one; and that such decision would form *res judicata* as to their titles in virtue of which the defendant can, at any time, take possession by an action to that effect, for it is not necessary to enable this court to pronounce on title that there must be a prayer to be put in possession. If the plaintiff succeeds we can declare that the defendant has failed to produce a title; that the plaintiff be preserved in the quiet enjoyment of his property and the defendant be enjoined from reasserting this title to it. This case differs little from the case of *Gravier vs. The Corporation of New Orleans*, except that trespass as well as slander was alleged there. But if this point was doubtful, I should have a great reluctance to send the parties back on a mere matter of form to travel over the same ground again. *Interest reipublicæ ut sit finis litium*. And never did the maxim have a more proper application than in the cases which have grown out of this subject." The court affirmed the judgment appealed from.

Mr. Justice Matthews, in concurring in the opinion, said: "The law on which this action is founded authorizes a judgment requiring and compelling a person who speaks against the title of a *bona fide* possessor, by asserting a right in himself, either to desist from such

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assertions or to bring suit in support of his alleged claim for the purpose of opposing his title to that of the possessor, in order that the respective claims may be finally settled according to law and justice. If the pleadings in the present suit do place the defendant in a situation similar to that which he would hold in an action which he might be compelled to institute, I can see no good reason for delaying a final judgment in the case, and that such is his situation, I agree in opinion with Judge Porter." This case, as well as the action referred to, was brought to the attention of the Supreme Court in *Proctor vs. Richardson*, 11 La. 188, and though the absolute judgment of the District Court in favor of the plaintiff was reversed, for the reason that the defendant filed no answer, and did not set forth the title of his children or the grounds of their alleged pretensions, and because the defendant, the father, was not the proper defendant in the case, as he had interests conflicting with those of his children, it is clear that the court approved the opinion in *Livingston vs. Heerman*, that a defendant may well set forth his title in his answer and the court proceed to adjudicate upon the relative titles without the necessity of a new suit. The court remarked that actions of the kind were of rare occurrence in Louisiana, but that statement was made in 1837. The action, with its rules, is one familiar to the bar and bench. (See *Dalton vs. Wickliffe*, 35 An. 355.)

We think that an examination of the pleadings of the plaintiff and defendants in the original suit in the Civil District Court fully sustain the District Court in declaring, in refusing Chadwick's motion for a new trial, that the idea which he entertained that the judgment as rendered remitted the parties to further litigation was unfounded, and that the issues referred to in the motion had been definitely disposed of. The defendant was well aware, as his motion showed, that he had advanced his own title in his pleadings, for he complained of the judgment that it had not "quieted him in his title." Defendant in his pleadings set out fully his own title and attacks that set up by the plaintiff and joined issue with the latter as to his right to be accorded the judgment he prayed for. We are of the opinion, as was the District Court which rendered the decree, that the parties went to trial in that case upon the strength and merits of their respective titles, and that the judgment rendered definitively closed all future discussion as to the ownership of the property. It maintained the Gulf States Land and Im-

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provement Company in their possession and enjoined Chadwick from disturbing said possession by slander of title, actual intrusion or otherwise; in other words, it restrained him from thereafter ever reasserting the title he had set up in his pleadings. A decree enjoining a person from reasserting title to the property involved is, in reality, one decreeing the plaintiff to be the owner of the same, though it may not so declare in express terms (*Heirs of Delogny vs. Mercer*, 43 An. 209). If our interpretation of the judgment of the District Court, pleaded as *res judicata*, be correct, the effect of the plea extended to Chadwick's vendor as well as to himself (*Gath vs. Broussard & Martin*, 49 An.).

The conclusions which we have reached as to effect of the judgments in the State court render unnecessary any expression of opinion as to those of the courts of the United States.

For the reasons herein assigned, it is ordered, adjudged and decreed that the judgment appealed from be and the same is hereby affirmed.

 No. 12,389.

STATE OF LOUISIANA EX REL. LOUIS P. PAQUET VS. GABRIEL FERNANDEZ, JUDGE OF THE SECOND CITY COURT OF NEW ORLEANS.

Attorneys at law are subject to the license tax for practising their professions imposed by municipal authorities and by the State. The license authorizing them in the first instance to pursue their profession is an evidence of character and capacity, and carries with it no exemption from taxation by license tax. The profession has no special privilege from that of other occupations.

Act No. 119 of 1882 authorizes municipal corporations to avail themselves of the remedies provided by the State for the collection of State taxes. Act 150 of 1892 authorizes any court having jurisdiction of the amount to issue a rule against the person owing a license tax, accompanied by an injunction restraining the carrying on the occupation until the license tax is paid, and to punish for contempt a violation of the restraining order.

The Second City Court, therefore, had jurisdiction of the amount and was empowered to issue the rule, give judgment for the amount, issue the restraining order, and to punish as in contempt its violation.

ON application for Writs of *Certiorari* and Prohibition.

Louis P. Paquet, in propria persona, and Thomas F. Maher (R. G. Cobb of Counsel), for Relator.

49	764
51	588
49	764
113	1029

State ex rel. Paquet vs. Judge.

Gabriel Fernandez, Judge, *in propria persona*, and *W. B. Somerville*, Assistant City Attorney, for Respondent.

Submitted on briefs January 18, 1897.

Opinion handed down February 1, 1897.

Rehearing refused March 15, 1897.

The opinion of the court was delivered by

McENERY, J. The relator is an attorney at law. The city of New Orleans proceeded against him by rule, to enforce the payment of a license tax for practising his profession within the corporation, under Sec. 18 of Act No. 150 of 1890, and the ordinance of the city of New Orleans in pursuance thereof.

The rule was accompanied by a prayer for an injunction against the relator, to compel him to cease pursuing his profession until he paid the license tax. There was no appearance made by defendant, and the rule was made absolute, and a judgment rendered against him for the amount of the license tax, and a restraining order was issued, forbidding defendant from pursuing the occupation of lawyer until he paid the tax. The restraining order was violated. A rule was issued against him for contempt of court, and he was adjudged guilty. To this rule the defendant filed an exception, alleging that he is an officer of the court, and can not, by the mode and manner of procedure in this case, be deprived of the privilege of practising his profession. That the proceedings against him are unconstitutional, null and void; that being an officer of the court his occupation is not subject to taxation; that the functions of the court are purely judicial, and it can not constitute itself a license collector; that any law which authorizes plaintiff's imprisonment, under said proceedings, is unconstitutional; that the court is without authority to punish for contempt under the proceedings taken against him, as there is no law conferring jurisdiction upon the city courts to punish for contempt.

The refutation of defendant's exception will require no extended argument. Lawyers have no more privileges than other citizens in the pursuit of their profession. The license to practise, granted to them under the law to pursue the profession of attorney, is only an evidence of character, fitness and ability. The privilege of pursuing

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the profession carries with it no exemption from the duties of citizenship, the sharing with others the expense of government, both State and municipal. If there is one thing more than any other which should impress itself upon the profession, it is the duty to aid and assist in the execution of the laws, and to bear the just proportion of expenses to make the government a vigorous and healthy instrumentality in the preservation of society and the protection of all citizens, in all their rights and in the pursuit of their occupations.

Act 119 of 1882 confers upon municipal authorities the right to pursue all remedies provided for the collection of State taxes, then in existence or thereafter to be enacted.

Act 150 of 1890, Sec. 18, authorizes the pursuit of a delinquent license payer by rule, and the accompanying of the same by injunction to restrain the party who owes the license from pursuing his occupation until the license is paid. And it authorizes any court of competent jurisdiction to entertain the rule, and to punish for contempt the violation of the restraining order. The city court had jurisdiction of the amount, and was vested with full power to enter judgment against the defendant for the amount, and to restrain the pursuing of his occupation until he pays the license tax. Having issued a restraining order within its jurisdiction, the court had the right to treat its violation as contempt of its authority and to punish the same.

The provisional orders herein issued are set aside and the relief prayed for denied.

No. 12,412.

STATE OF LOUISIANA VS. NICHOLAS KRAEMER.

ON RULE.

The court again affirms that on the question of the exceptions reserved by the counsel of the accused, the bills brought up and the statement of the trial judge must control us on the appeal. State vs. Romero, 5 An. 24; State vs. Lacombe 12 An. 185.

ON THE MERITS.

If a person being in possession of his mental faculties voluntarily gets into a fit of drunkenness, and during such drunkenness commits a homicide under a diseased mental condition occasioned by the same, he can not set up said diseased mental condition as an excuse for his act.

In order that a man should stand excused for a homicide committed during drunkenness, and while in a diseased mental condition, the diseased mental condition which excuses the homicide should be able to be successfully urged as an excuse for the act of getting drunk.

49 766
105 236
49 766
e117 874

49 766
120 347

49 766
f124 85

State vs. Kraemer.

It is as possible for an insane man to get drunk as a sane man. The addition of drunkenness to insanity does not withdraw from such person the protection due to insanity, but when such a person commits a homicide during drunkenness reliance must be placed upon the original insanity itself, not the subsequent drunkenness.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Baker, J.*

M. J. Cunningham, Attorney General, and *R. H. Marr*, District Attorney, for Plaintiff, Appellee.

Paul W. Mount and *James Wilkinson* for Defendant, Appellant.

Submitted on rule for production of instructions February 15, 1897.
Opinion handed down March 1, 1897.

ON RULE.

Submitted on briefs March 6, 1897.
Opinion handed down March 15, 1897.

The opinion of the court was delivered by

MILLER, J. The relator seeks by this application to compel the clerk of the Criminal District Court to transmit the request made of the lower court on behalf of the accused, to give certain instructions to the jury that tried him. The relator's petition alleges that these instructions were asked, refused and exceptions reserved to the refusal.

The return of the clerk, in which the judge joins, is that but one bill was reserved, which we find in the record.

The judge states besides that although no bill was reserved other than that signed, he offered to counsel to sign a bill reserving all the exceptions the counsel claims to have reserved, but he did not avail of this offer. We find in the record but one bill and the statement of the judge, that bill exhibits the only point reserved.

We have often had occasion to observe that we must be guided on questions of the character raised here, by the bills we find in the

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record and the statement of the judge. We must apply that rule in this case.

It is therefore ordered, adjudged and decreed that the relator's application be denied and our previous order on his petition be set aside.

ON THE MERITS.

NICHOLLS, C. J. Defendant having been indicted for the murder of Mary Cooney and the jury which tried him having returned a verdict of guilty without capital punishment, he was sentenced by the court to hard labor for life in the State penitentiary. From that sentence he has appealed.

He relies upon the following bill of exception:

"Be it remembered that on the trial of this cause a number of witnesses having testified before the jury that the accused Nicholas Kraemer had from his boyhood to the present time been considered by his associates as light minded and had been known by the soubriquet of 'Crazy Nick;' that the drinking of liquor seemed to put him in a frenzy; that he had previous to the time of the homicide been a steady drinker and on the morning of the homicide he had come home after a night's absence at 8:30 A. M., terribly intoxicated; that he had called for his Sunday clothes and taking them into the yard chopped them up with a hatchet into little pieces muttering, and when deceased tried to get him to desist, threatened her life with a hatchet; that it was further shown that three hours later he was seen in the back yard of a grocery near by shrieking; that at about the time of the homicide, 12:30 P. M., he returned to the house walking straight and went in to sit down to dinner with the deceased alone, from which place he came out and was seen bareheaded walking rapidly and straight away from place where deceased had been left with her throat cut and that when arrested was walking erectly with a staring look in his eyes; that he had taken a ten-year-old boy's hat and put it on his head and when questioned, refused to answer, and it having been urged on his behalf by his counsel on the trial that if the killing of the deceased had been done by accused, it was done:

"1. Because he was insane and was not responsible for his acts.

"2. Because such insanity, though possibly slight, was enhanced and made dangerous and homicidal by the use of liquor, which acted as a

State vs Kraemer.

poison to the mental disease of said accused, and that there was no motive for said act.

"3. Because all the symptoms described in said testimony as to accused showed that such insanity or low order of intelligence was aggravated into homicidal mania by *delirium tremens*, from which he was suffering at the time it is claimed he killed Mrs. Cooney, the deceased.

"And on the part of the defence, counsel having requested the court to charge the jury as per the written request set forward and numbered and made a part of this bill of exceptions, and the court having failed to charge Nos. — in said charge requested, and the said court moreover having failed to charge as to request Nos. —, and the said court having moreover charged that any temporary insanity the result of drunkenness will not excuse crime, and that only permanent insanity the result of drunkenness will excuse crime, or in words of similar import or effect, and the said counsel for accused having thereupon, before the jury retired, taken the within bill of exceptions:

"1. To the failure of the court to charge as requested.

"2. To the refusal of the court to charge as requested.

"3. To the charge of the court to the jury as herein stated.

"Counsel for the accused now having submitted this bill of exceptions to the District Attorney, now tenders the same to this Honorable Court for its approval and signature.

"By the Court. The jury were charged fully as to the law of insanity, whether brought about by intoxication or other causes. The jury were instructed that temporary insanity produced by undue indulgence in spirituous liquors furnished no excuse for homicide or other crime, but that fixed insanity did. As to special request No. 3, they were further instructed that *delirium tremens*, or fixed insanity, formed an excuse for the act provided the party was not intoxicated at the time. My idea of the law is, that if the mental condition of the accused is the remote consequence of antecedent drunkenness, then he is not responsible, but that if his act takes place in a fit of intoxication, and is the immediate result of it, then he is. In my charge I endeavored to give the jury all the law applicable to the case."

The sixth special charge referred to in the bill of exception reads as follows:

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"*Delirium tremens*, although the result or consequence of continual drunkenness, is insanity or a diseased state of mind, and effects responsibility for crime in the same way as insanity produced by any other cause. *Delirium tremens* like insanity, if it deprives a man of capacity of knowing right from wrong, saves him from any criminal responsibility for his acts."

The charge given by the court is not in the record, so that we can not test the propriety of a particular portion of it by reference to it. The only way in which we come to a knowledge of any part of it is through the statement made by the court itself at the foot of the bill of exceptions.

The recitals of the bill as to what the testimony in the case showed afford us no aid in passing upon the question before us, as the testimony was directed to the establishment of issues of fact, the conclusions as to which were to be disposed of and were disposed of by the jury. What those conclusions were, upon the different issues raised, we do not know. We know only the result reached in their verdict. Whether the accused, as a fact, was at the time of the homicide insane or not, we do not know, nor do we know, if insane, whether he was at that time suffering from *delirium tremens*. The instructions asked seemed to have assumed that the nature, causes and consequences of *delirium tremens* were fixed facts, known to and to be announced by the court to the jury, and to have further assumed as a fact that accused at the time of the homicide was under its influence and effects. Those matters were matters under expert and other evidence in the case, to be determined by the jury.

The doctrine with reference to drunkenness, in relation to crime, is thus stated by Bishop:

"If a man intending one wrong accomplishes another, he is punishable for what is done, though not intended except where a specific intent in distinction from mere general malevolence or carelessness is an essential element in the particular crime. The law deems it wrong for a man to cloud his mind or excite it to evil action by the use of intoxicating drinks; and one who does this, then, moved by the liquor while too drunk to know what he is about, performs what is ordinarily criminal, subjects himself to punishment; for the wrongful intent to drink coalesces with the wrongful act done while drunk and makes the act complete" (Bishop's Crim. Law, 6th Edition, Chapter XXVII, par. 897).

The common law has always regarded drunkenness as being in a certain sense criminal. Since, therefore, a man who intends one wrong and does another of the indictable sort is punishable even when the wrong intended would not be so if actually done, voluntary drunkenness supplies in ordinary cases the criminal intent. Thus when a man voluntarily becomes drunk that is the wrongful intent, and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is therefore a legal doctrine, applicable in ordinary cases, that voluntary drunkenness furnishes no excuse for crime committed under its influence. It is so even when the intoxication is so extreme as to make the person unconscious of what he is doing, or to create a temporary insanity (Bishop, pars. 399 and 400). The author referring to limitations of the doctrine says:

"The law holds men responsible for the immediate consequences of their acts, but not ordinarily so for those more remote. If, therefore, one drinks so deeply or is so affected by the liquor that for the occasion he is oblivious or insane, he is still punishable for what of evil he does under the influence of the voluntary drunkenness. But if the habit of drinking has created a fixed frenzy or insanity, whether permanent or intermittent, as for instance *delirium tremens*, it is the same as if produced by any other cause excusing the act. For whenever a man loses his understanding as a settled condition he is entitled to legal protection equally, whether the loss be occasioned by his own misconduct or by the dispensation of Providence" (Bishop, par. 406).

Referring to cases requiring specific intent the author says:

"It is plain that when the law requires as it does in some offences a specific intent in distinction from mere general malevolence to render a person guilty, the intent to drink and drunkenness following can not supply this specific intent. Thus drunkenness as we have seen does not incapacitate one to commit either murder or manslaughter at the common law; because to constitute either the specific intent to take life need not exist, but general malevolence is sufficient. But where murder is divided by statute into two degrees and to constitute it in the first degree, there must be the specific intent to take life—this specific intent does not, in fact, exist, and the murder is not in this degree, where one not meaning

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to commit a homicide becomes so drunk as to become incapable of intending to do it; and then in this condition kills a man. In such a case the courts hold that the offence of murder is only in the second degree. This doctrine does not render it impossible for one to commit murder in the first degree while drunk. If he resolves to kill another, then drinks to intoxication and then kills him, the murder is of the first degree, because in this case he did specifically intend to take life. And a man though drunk, may not be so drunk as to exclude the particular intent. Drunkenness short of the extreme point, therefore, will not reduce the murder to the second degree." Bishop, pars. 410, 401.

"There are cases not requiring a specific intent where the precise state of the prisoner's mind is under special circumstances important. Not conflicting with what has been previously laid down, it is pretty well settled that there are circumstances on which evidence of intoxication may be properly received to reduce a homicide to manslaughter. Some judges seem not willingly to yield this point, but the better opinion is that if, for instance, the question is whether the killing arose from a provocation which was given at the time, or from previous malice, evidence of the prisoner's having been too drunk to carry malice in his heart may be admitted. And the consideration is not to be withheld from the jury that his drunkenness may render more weighty the presumption of his having yielded to the provocation rather than to the previous malice, because of the fact that the passions of a drunken man are more easily aroused than those of a sober one. This doctrine differs from the untenable one that drunkenness excuses or palliates passion or malice. So intoxication is relevant to the question whether expressions used by a prisoner sprang from a deliberate evil purpose, or were the mere idle words of a drunken man. This evidence, moreover, assists in determining whether a defendant acted under the belief that his property or person was about to be attacked."

In *Haile vs. The State*, 11 Humph. 154, it was said that when the question was what was the actual mental state of the perpetrator at the time the act was done, whether it was one of deliberation and premeditation, then it was competent to show any degree of intoxication that might exist, in order that the jury might judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done.

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The court, however, said that when the question was whether drunkenness could be taken into consideration in determining whether a party be guilty of murder in the second degree, the answer must be that it can not. It was further said that the law implied malice from the manner in which the killing was done or the weapon with which the blow was stricken. In such cases it is murder, though the perpetrator was drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness is caused.

"The law in such cases does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which malice is implied having been proved, the law presumes its existence and proof in opposition to this presumption is irrelevant and inadmissible. Hence, a party can not show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him."

In a note to Bishop, par. 400, Lord Coke is quoted as saying that although he who is drunk is for the time *non compos mentis*, yet this drunkenness did not extenuate his act or offence, nor turn to his avail, but it is a great offence in itself, and therefore aggravates his offence. The author adds that it is not, however, strictly true that drunkenness aggravates a crime; it simply furnishes no excuse (quoting *McIntyre vs. People*, 38 Ill. 514).

Drunkenness in its relation to crimes has been considered a number of times by this court. Among the cases bearing upon the subject, we note *State vs. Mullen*, 14 An. 570; *State vs. Coleman*, 27 An. 692; *State vs. Watson*, 31 An. 379; *State vs. Willis*, 43 An. 407; *State vs. Ashley*, 45 An. 1086; *State vs. Hill*, 46 An. 27.

We have given careful consideration to the argument in behalf of defendant by his counsel and have reached the conclusion that tested by the principles laid down in the commentators, the decisions of courts other than those of Louisiana and by our jurisprudence defendant has shown no proper case for relief.

We think that the jury was substantially instructed that when a prisoner urges that he should be held "excused" from criminality for a homicide which he had committed (we use that term in contradistinction to a plea for reduction of the grade of criminality charged) by reason of his having been laboring under "*delirium tremens*" at the time of the commission of the act and that he was

therefore unable to know, realize, or appreciate, what he was doing, the *delirium tremens* must be shown to have antedated the fit of drunkenness, during the existence of which the act was committed.

In other words, that if a person being in possession of his mental faculties, voluntarily gets into a fit of drunkenness, and during such drunkenness commits a homicide under a diseased mental condition occasioned by the same, he can not set up such diseased mental condition as an excuse for his act; that in order that a man should stand excused for a homicide committed during drunkenness and while in a diseased mental condition, the diseased mental condition which excuses the homicide should be able to be successfully urged as an excuse for the act of getting drunk.

It is a well-known fact that men who, at the time of voluntarily getting drunk are in full possession of their mental faculties, and who are in the same condition when the fit of intoxication passes away, frequently commit acts during the drunkenness of which they have absolutely no recollection on regaining a condition of sobriety—acts committed under a substantial condition of temporary insanity. All writers agree that a homicide committed under such conditions does not stand excused. The effect of drunkenness upon the mind and upon men's actions when under the full influence of liquor, are facts known to every one, and it is as much the duty of men to abstain from placing themselves in a condition from which no such danger to others is to be apprehended as it is for men to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences. It would open the door wide to the commission of crime were we to justify the commission of a homicide committed under a condition of mind designated as *delirium tremens*, when it was, in all probability, nothing more nor less than the condition of mind usually resulting from a condition of thorough drunkenness.

It would be utterly impossible to distinguish between the two conditions of mind, if, in reality, there be a difference between the two.

It is, of course, as possible for an insane man to get drunk as a sane one. The addition of drunkenness to insanity does not withdraw from such person the protection due to insanity, but when such a person commits a homicide during drunkenness reliance must be placed upon the original insanity itself, not upon the subsequent drunkenness. We are of opinion the judgment should be affirmed.

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We have no different degrees of murder in this State, but parties accused get all the benefit which would arise from grading the crime, in the flexibility given to the punishment which is to be meted out in any given case, by allowing the jury, under a charge of murder, to bring in a verdict of guilty without capital punishment. The jury are enabled to give to the accused the benefit of any extenuating or mitigating circumstances which would save them from suffering the extreme penalty of the law. We gather from the record that the deceased in this case came to her death by having her throat cut by the defendant. The jury evidently gave some effect to the condition of drunkenness which, we infer, must have been established on the trial.

The judgment is affirmed.

No. 12,882.

LUCIEN ADAMS VS. SUCCESSION OF FANNY S. MILLS.

Parol evidence shall not be received to prove any acknowledgment or promise to pay any debt or liability, in order to take such debt or liability out of prescription or to reverse the same after prescription has run or been completed. Art. 2278, C. C.

The prescription of three years, formerly applicable to all open accounts, could not, *under a law such as now exists* (in respect to the kind of evidence needed to establish an interruption or suspension of prescription), have been avoided by showing a verbal acknowledgment of the account by the deceased debtor and then converting the open account into an account stated. The present case fully comes under the decision in Succession of Gaines, 45 An. 1424.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Lazarus, Moore & Luce for Plaintiff, Appellant.

Chrétien & Suthon for Defendant, Appellee.

Rogers & Dodds and Chas. F. Claiborne for Intervenors, Appellees.

Argued and submitted March 30, 1897.

Opinion handed down April 12, 1897.

49 775
49 1426

49 775
105 808

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The opinion of the court was delivered by

NICHOLLS, C. J. Plaintiff seeks a judgment of twelve thousand dollars, with interest, against the succession of Fanny S. Mills.

The demand is based upon allegations that for a period of eight or ten years prior to March, 1893, petitioner had been serving the late Mrs. Fannie Seymour Mills, in the capacity of business, professional and confidential adviser; that during the said period, from time to time, and from day to day, he performed divers and sundry services for her, with references to her business and household affairs, the trouble between herself and her late husband, and in various other similar ways, the said services having been performed continuously during that time; that she had no relatives or connections; that her acquaintance was very limited, and that she had, during that time, no person in whom she had confidence and to whom she could look for advice and assistance in the matters aforesaid, except petitioner, from whom she daily received aid and assistance; that she was addicted to drinking, and was of an exceedingly quarrelsome, violent and irritable disposition; that that fact made the services more onerous and valuable; that her husband was also addicted to drinking heavily, and that during said period he was often called upon to give attention, at her request, to her and her husband; that the services rendered were too numerous to specify in detail; that during the month of March, 1893, or thereafter, compensation for the services which petitioner had rendered was fixed and agreed upon between petitioner and Mrs. Mills, at the sum of ten thousand dollars, and she, at that time, and on numerous subsequent occasions, promised to pay petitioner said sum, but she failed to do so.

That during the latter part of 1893 and the years 1894 and 1895 petitioner continued to perform services as the business and personal adviser of Mrs. Mills as set forth, and considering the nature of the services and the fact that she had become an invalid and blind, they were fully worth the sum of one thousand dollars per annum, making an additional sum of two thousand dollars due him, besides the ten thousand dollars fixed between Mrs. Mills and himself.

That she having promised to pay the amount due petitioner, he refrained from bringing suit to enforce his demand, relying upon her promise as well as considering her condition. That by reason of the agreement between her and himself he was entitled to the sum

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of ten thousand dollars, and to two thousand dollars additional for the services rendered after the date of said agreement up to the time of her death, they being well worth that amount.

The public administrator, who was administering the succession of Mrs. Mills, was made defendant. As such he answered, pleading the general issue and the prescription of three years. Two parties, claiming to be a brother and sister of the deceased, joined the defendant in resisting the demand. The District Court rendered judgment in favor of the plaintiff for one hundred dollars, and he appealed.

On the trial parol evidence was permitted by the court over defendant's objections, to be introduced to support plaintiff's allegations as to the promises made by Mrs. Mills to plaintiff. It was allowed under a reservation by the court that it would ultimately give it only such effect as it was legally entitled to. The objection urged was that the testimony had for its object to prove an acknowledgment of a debt by a party deceased in order to take the same out of prescription, a kind of evidence inadmissible for that purpose under the provisions of Art. 2278 of the Civil Code.

In rendering its judgment the court held that the objection had been well taken, and that all parol evidence necessary and tending to interrupt or suspend prescription should be disregarded.

Considering the case as presented, it was of the opinion that the alleged verbal "contract" sued on was not a contract, but a verbal promise to pay a prescribed debt, and therefore the claim for services rendered prior to 1893 was prescribed by the prescription invoked.

In reference to the claim for services rendered since 1893 the court said: "The only services for which plaintiff could claim compensation were those rendered in his capacity as attorney at law in court, or by giving the deceased legal advice as to litigation, pending or threatened. It is proved that the only litigation deceased had since 1893 was in reference to the succession of her deceased husband, in respect to a tomb in the St. Louis Cemetery, and in regard to a threatened litigation in regard to some gravel paving. In the succession of her husband she was represented by two able and experienced lawyers at this bar, both of whom have been compensated by her or her succession. In the matters in reference to the tomb and gravel paving, she was represented by another able lawyer

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of the bar, who has been compensated by her or her succession for his services. It is proved that the plaintiff never appeared for the deceased in any court of justice, in any proceeding in this city or elsewhere. It is proved that he advised her in reference to the litigation in court as to whether the attorneys she had employed had performed or were performing their duty. For this advice, given at different times and on various occasions and for the trouble to which the plaintiff was put in order to give that advice, the court considers that he is entitled to one hundred dollars. All the other services claimed and rendered by the plaintiff to the deceased, the court is satisfied, were rendered for friendship, in the capacity of her friend, for forty-six years. They are services for which the law grants no compensation."

Plaintiff's demand is for remuneration for services alleged to have been rendered to Mrs. Mills during her lifetime. It is not claimed that either prior to, or as they were being rendered, there was any agreement or understanding that plaintiff was to be compensated, still less that the value or the manner or time of payment thereof had been fixed. He relies upon the vaguest kind of declarations of Mrs. Mills, after the alleged services were rendered, that she was under obligations to him, which she would remember and recognize in her will. The first decided promise by her to pay him for the same is set up by the plaintiff as being in 1893. Plaintiff attempts to bring his claim under the control of the principles announced in the Succession of Fowler, 7 An. 207; Alexander vs. Alexander, 12 An. 590; Nimmo vs. Walker, 14 An. 589; Copse vs. Eddins, 15 An. 528; Gaines vs. Succession of Del Campo, 30 An. 246; Danenhauer vs. Succession of Brown, 47 An. 342; Succession of McNamara, 48 An. 45; but we think that in several most important respects the cases differ. In the first place, in the different cases cited the extent of the services rendered were fully shown, as was also their character as being such, which both parties would naturally and properly expect to call for payment. C. C. 1773. In this case the difficulty which plaintiff encountered in specifying in his petition what the services performed by himself were, followed him into his proof, for leaving aside the acknowledgments of the same which are asserted to have been made by the deceased, the plaintiff's claim rests practically on no evidence. Plaintiff in his own testimony makes no such showing as he could reasonably expect would form the basis for a judgment.

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But even were the evidence in the case other than what it is, plaintiff would meet with an insurmountable obstacle in the objections urged and the result of the objections urged to allowing the introduction of parol evidence to establish the promises or acknowledgments which he declares were made by Mrs. Mills.

Article 2277 of the Civil Code declares that "parol evidence shall not be received * * to prove any acknowledgment or promise to pay any debt or liability in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed." The parol evidence tendered by plaintiff was not to establish a contract which, by its special terms at its inception, was of a character such as to withdraw it from the prescription ordinarily applicable to contracts of that kind.

What he attempted to do was to prove that services which, as to their payment, would be prescribed by three years, had been taken out of such prescription and thrown under that of five or ten years by a subsequent promise or acknowledgment. Under the law, as it stood when the decision in the succession of Fowler was rendered, that could have been done, but subsequent legislation has changed the legal situation. The District Court correctly drew the distinction between parol proof of the original terms of a verbal contract and parol evidence of a verbal acknowledgment by a deceased person of a pre-existing claim, which, but for such acknowledgment, would be prescribed.

The prescription of three years, formerly applicable to all open accounts, could not, under a law such as now exists (in respect to the kind of evidence needed to establish an interruption or suspension of prescription), have been avoided by showing a verbal acknowledgment of the account by the deceased debtor, and thus converting the open account into an "account stated." The present case fully comes under the decision in the Succession of Gaines, 45 An. 1424.

Plaintiff urges that the continuity of plaintiff's services postponed the date of the beginning of the prescription applicable to them to the close of the services. Their character was such as to exclude them from the operation of such a doctrine, if one exists, as they seem to have consisted of small services, each separate and distinct from the other.

We are of the opinion that the court was correct in holding

State vs. Clark.

that all claims of plaintiff, prior to 1898, were prescribed. We see no error in the court's judgment upon claims subsequent to that date. We do not think it necessary to enter into an analysis of the testimony in the case.

The judgment is affirmed.

No. 12,450.

STATE OF LOUISIANA VS. ARTHUR CLARK.

Transcript of appeal filed after the expiration of return day will be dismissed.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff, Appellee.

H. T. Liverman for Defendant, Appellant.

Submitted March 20, 1897.

Opinion handed down April 12, 1897.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant, indicted for murder, has appealed from the judgment of the District Court sentencing him to hard labor in the penitentiary for life under a verdict returned against him of "Guilty without capital punishment."

The State moved for the dismissal of the appeal on the ground that the transcript was filed too late.

The prisoner was sentenced on February 18, 1897. On his application made the same day he was granted an appeal, returnable to the Supreme Court at New Orleans in ten days. The transcript of appeal was filed in this court on March 9, 1897. No explanation of or excuse for the delay has been assigned, though defendant was represented by regular counsel. We have no alternative left to us.

The appeal is dismissed.

Sims vs. Walshe.

No. 12,099.

PHILIP H. SIMS VS. BLANEY T. WALSH.

49	781
51	1623
49	781
107	352

ON MOTION TO DISMISS.

When the petition avers the value of the property sued for is sufficient to give this court jurisdiction, and no issue has been raised on that point in the lower court, the motion to dismiss the appeal will not prevail, unless the record clearly shows there is no jurisdiction.

Least of all, will the motion be favored when the appellee has affirmed our jurisdiction by dismissing the previous appeal to the Circuit Court, on the ground that the appeal was within our cognizance.

ON THE MERITS.

When the authority exists for the sale made by the tax collector his deed is not vitiated by the reference in the deed to a superseded legislative act, instead of the existing act under which the sale is made.

The case is discriminated from those in which no authority existed for the sale.

Watkins, J., Dissenting: A tax sale made in 1888, in the enforcement of taxes assessed in 1887, under and in pursuance of the revenue law of 1882, is null and void, because the same had been repealed and superseded by the revenue law of 1886.

In case a tax sale is made under a current revenue law, enacted under the Constitution of 1879, the adjudicatee carries the burden of establishing, with a reasonable degree of certainty, that all legal requirements of assessment and sale have been complied with, on pain of nullity.

The nullity of the primary tax sale to the State is necessarily imparted to a subsequent title which the State conveys to a third person.

A co-owner of an undivided interest in real estate can not be permitted to imperil the interest of his joint proprietor, by means of a collusive combination with other persons to interpose an apparent, though fraudulent obstacle to the enjoyment of his rights, through the instrumentality of an acquiescence in an illegal tax sale.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Frank L. Richardson and Lloyd Posey for Plaintiff, Appellant.

Gurley & Mellen and Buck, Walshe & Buck for Defendant, Appellee.

ON MOTION TO DISMISS.

Argued and submitted May 23, 1896.

Opinion handed down April 12, 1897.

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ON MOTION TO DISMISS.

The opinion of the court was delivered by

MILLER, J. The defendant moves to dismiss this appeal, on the ground that the property plaintiff seeks to recover is shown by the record, it is claimed, not to be of the value sufficient to give jurisdiction to this court of this controversy.

The defendant relies in support of his motion on the assessments of the property for taxes for the years 1887 to 1898 at one thousand dollars: and on the fact that shortly before the institution of this suit the property was adjudicated, at public auction for one thousand four hundred and fifty dollars, the plaintiff then being the owner and defendant, the adjudicatee, failing to comply. Assessments can not be accepted as conclusive on the question of value, and those relied on in this case carry less weight, from the fact that the same valuation, one thousand dollars, has been carried on the rolls for the past eight years. A bid at an auction as a test of value depends upon the number of persons in attendance, the competition of bidders, and other circumstances. As against the assessments and the bid of one thousand four hundred and fifty dollars, there is, in the allegation in the petition, that the property is of the value of twenty-five hundred dollars, and the affidavit of two auctioneers, familiar with property values, that the property is of value exceeding two thousand dollars. There was no contestation in the lower court as to the jurisdiction, and in the absence of any testimony specially directed to that issue, we do not feel authorized to dismiss an appeal, always to be maintained, unless the basis to deny the right is clearly established. We have the jurisdictional allegation in the petition not controverted by any pleading. Without passing on the question of plaintiff's right to produce in this court the affidavits as to value, admissible as a general rule when the petition does not show jurisdiction as to amount, in our opinion the allegation in the petition, on this point, is not disproved by the testimony in the record. 1 Hennen's Digest, p. 16, Nos. 1 and 8.

The brief for plaintiff states the appeal first taken to the Court of Appeals was dismissed on defendant's motion, on the ground the petition showed the value of the property beyond the jurisdiction of that court. The plaintiff's case would be hard if now, on defendant's motion, he was denied his appeal here.

Sims vs. Walshe.

It is therefore ordered, adjudged and decreed that the motion to dismiss is denied.

WATKINS, J., concurring. The defendant and appellee moves to dismiss the plaintiff's appeal on the ground that the matter in dispute is below the lower limit of this court's jurisdiction. This is a petitory action for the recovery of real estate which is estimated in the petition to be worth twenty-five hundred dollars; and in this court plaintiff has produced the affidavits of two apparently competent persons who affirm that it is worth twenty-one hundred dollars.

Under the decisions, that is sufficient warrant to justify this court in assuming jurisdiction. In addition it may be properly observed that this case was first appealed to the Circuit Court of Appeals, in which the appeal was dismissed for want of jurisdiction.

ON THE MERITS.

The opinion of the court was delivered by

WATKINS, J., And handed down on June 15, 1896, affirming the judgment of the District Court.

On February 15, 1897, a rehearing was granted.

On the rehearing, the case was submitted on briefs March 19, 1897.

The opinion of the court was delivered by

MILLER, J. This is a petitory action in which the basis of plaintiff's demand is a tax title, and he appeals from the judgment dismissing his demand.

The property was assessed as that of B. W. Elder; was sold in 1888 for the unpaid taxes of 1880 and bought by the State. Thereafter the State sold the property to Mrs. T. O. Starke, and she sold it to plaintiff in 1891. The defendant and Elder were joint owners, though the legal title was in Elder, in whose name the property was assessed.

The petition avers the tax sale to the State, the sale by the State to Mrs. Starke and the purchase from her by the plaintiff, Sims. The answer charges that by the fraudulent combination between Elder, the defendant's coproprietor, and the plaintiff, the title was made to the plaintiff for Elder's benefit; that defendant's right could not be divested by this fraud of his coproprietor, and the answer further charges that the tax sale to the State, under which plaintiff charges

claims, was void because the authority to make that sale stated in the deed did not exist, hence the answer insists defendant is still the owner of one-half the property.

The tax title by the State recites the sale in 1888 to the State for the unpaid taxes of 1887, under the authority of the Act No. 96 of 1882, and other acts in such cases provided. The defect to this title urged by defendant is that the revenue act of 1882, recited in the deed as the authority by which the tax collector sold to the State, had been amended by the Act No. 107 of 1884 and repealed by Act No. 78 of 1886. These later acts contain a repeal of laws on the same subject matter.

The section conferring on the tax collector authority to sell and buy for the State, contained in the act of 1882, Sec. 52, is repeated in the act of 1886, so that though the act of 1882, referred to in the tax deed had been superseded, precisely the same authority subsisted when the sale in this case occurred. We have been referred in support of defendant's objection to the deed to the settled principle there must be authority in the tax collector for any sale he makes. *Blackwell on Tax Sales*, p. 405, *et seq.* Thus where no act existed directing the sale, when made under an authority withdrawn by later legislation; where the act directed sales to pay taxes of particular years, but not for the year or years for which the property was sold, or where the sale was authorized of one species of property, but not of that sold, and similar cases, tax sales have been annulled. *Eldridge vs. Tibbitts*, 5 An. 380; *Collector vs. Britton*, 23 An. 511; *Prescott vs. Payne*, 44 An. 650, cited by defendant, and there are cases of similar type. But in this instance there was no moment of time since 1882 when the authority to sell for unpaid taxes did not exist. If the act of 1882 was repealed, the later with the same authority was at once supplied. There was then the requisite authority when this sale was made to the State. We do not think the sale was vitiated merely and only because the deed referred to the repealed act, instead of the act of 1886, especially as the deed also referred to the laws in force on the subject, nor because there was a charge for the deed allowed by the former and not the later and existing act.

The defence there was a fraudulent combination between Sims, the plaintiff, and Elder to defeat defendant's title, has had our attention. In this connection defendant has put in evidence a quit-claim

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to him to the property by Elder, executed after the tax sale, and after, with Elder's knowledge, the property had been sold by Starke to plaintiff. The quit-claim implied that no sale to Elder's knowledge had been made to plaintiff, for Walshe could not suspect that Elder, with full knowledge of the sale to plaintiff, would execute the quit-claim, or at least without mentioning a fact so pertinent. The quit-claim, it is urged, shows fraud in Elder, especially as it is shown he assisted in bringing about the sale by Mrs. Starke to plaintiff. It is in evidence that Mrs. Starke, after she bought, offered the property to Elder, who, declining, referred her to Sims, as likely to buy, and he did buy. Whatever room for comment there is, with reference to Elder's course, the question remains, how is Sims to be affected in his purchase of the property from Mrs. Starke, whose title is not assailed? There is no testimony to connect Sims with Elder, except their relationship as brothers-in-law and occupancy of the same office. There is the testimony of Sims of his ignorance of the relations of Elder and Walshe, and that he bought from Mrs. Starke and paid the price in good faith, acquiring only for himself. It was not until he sold the property, it appears, he had any knowledge of Walshe's previous connection with the property, then acquired by the registry of the quit-claim by Elder to Walshe. It is urged on us as a circumstance of suspicion that before buying Sims required a quit-claim from Elder. Any purchaser from one holding a tax title it seems to us, might naturally seek, if he could get it, a quit-claim from the assessed owner on his coproprietor. Unless we can assume fraud in Sims from his relationship to Elder, Sims stands before us as a purchaser in good faith of property sold more than a year previous at a tax sale. Then too, that sale to the State, followed by the State's sale to Mrs. Starke, completely divested the ownership of Elder as well as of Walshe. No fraud of Elder or complicity, real or supposed, of the plaintiff Sims, could have affected Walshe, who had by the tax sale lost the property and all right of redemption before Sims acquired or was brought in any contact with the subject.

It is therefore ordered, adjudged and decreed that our former judgment be set aside, and it is now ordered, adjudged and decreed that the plaintiff Sims be, and he is hereby decreed to be the owner of the property sued for described in his petition, and that defendant pay costs.

DISSENTING OPINION.

WATKINS, J. Plaintiff claims the ownership of a square of ground situated in the Sixth District of the city of New Orleans, bounded by Oliver, Wall, Walnut and Fourcher streets, averring that same was derived through the following chain of titles, viz.:

First. From Dora Lambeth, wife of Theodore O. Starke, by authentic act of date 12th of September, 1890, for the price of three hundred dollars—the act containing the statement, that it was “the same property which was acquired by the present vendor by purchase at a sale made thereof by the State Tax Collector of the city of New Orleans, on the 12th day of December, 1889, for the unpaid State taxes due thereon for the year 1887, as will more fully appear from an act of sale of the 2d of May, 1890, from the State of Louisiana (through) Benjamin W. Elder to Mrs. Dora L. Starke,” etc.

Second. From the State of Louisiana to Dora Starke, by authentic act of date 2d of May, 1890, the act reciting that the sale was made in pursuance of Act No. 80 of 1888, for the consideration of twenty-five dollars.

Third. From Benjamin Elder to the State of Louisiana by authentic act of sale of date 13th of July, 1888, the act reciting that the sale was made at public auction by the State Tax Collector, in pursuance and by virtue of the power in him vested by the provisions of Act 96 of 1882, and of the laws in such cases provided, to enforce the payment of State taxes on the aforesaid property for the year 1877, and that same was adjudicated to the State for the price of thirteen dollars and fifty cents, same being the amount of the taxes for said year.

Under this statement, the ownership of the plaintiff is asserted under, and exclusively based upon the tax sale of July 13, 1888, and the tax collector's adjudication of said property to the State of Louisiana, in satisfaction of the unpaid taxes of Benjamin Elder, for the year 1887; and, consequently, the plaintiff's title must depend, for its validity, upon that adjudication, as his title states specifically and in detail its origin and source.

In addition to the chain of title, as thus set out, the petition avers, that the defendant claims to be the owner of said property, and has taken illegal possession thereof; and that he has caused to be recorded in the conveyance office a pretended transfer by one B. W.

Elder, under private signature, bearing date 23d of February, 1891, and registered on the eleventh of the same month.

It avers that said pretended transfer is null and void, and of no validity, for the reason that said Elder was not the owner of said property at the time of said transfer, and has no right in said property which he could convey to said Walshe.

Petitioner places the rental value of said property at ten dollars per month, and avers that he is entitled to claim rent at that price from the 13th of September, 1890—the date he acquired title from Dora Starke.

His prayer is for judgment decreeing him to be the legal owner of said property and entitled to possession thereof; and for ten dollars per month rent from the aforesaid date.

The substance of defendant's answer is, that plaintiff is not the owner of the property, coupled with an averment that the title set up by him is illegal, null and void.

He avers that said property was originally acquired by him, jointly with one Benjamin W. Elder, on December 12, 1884, by purchase from M. J. Farrell, but that the title was, for mutual convenience, taken in the name of B. W. Elder alone—constituting each the owner of an undivided one-half interest therein.

That, by act of February 23, 1891—the one above referred to—said B. W. Elder conveyed and delivered to him, for a valuable consideration, all of his right, title and interest in said property.

That the plaintiff entered into an illegal combination and collusive conspiracy with said B. W. Elder and others for the purpose and with the object of defrauding him of his interest in said property.

That, in pursuance of said collusion and conspiracy, said Elder allowed said property to be sold for taxes, and that, subsequently, to-wit, on the 27th of August, 1890, he gave to the plaintiff, without consideration, and without his (defendant's) knowledge or consent, a paper purporting to be a quit-claim title to the said property; and that the intent and purpose of said pretended quit-claim title was to defeat his (defendant's) right therein, by an attempted confirmation of the aforesaid tax adjudication to the State, and from whom plaintiff acquired, through Mrs. Starke, on the terms and conditions already stated.

The defendant further avers that, at the time of all of these illegal and wrongful acts, both the plaintiff and Elder were aware of his

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interest in the property, but neither of them informed him of said proceedings.

Further answering, the defendant sets up his title and prays judgment in reconvention, decreeing him to be the sole owner, and annulling and setting aside the alleged titles of the plaintiff and his authors in title.

On the trial there was judgment in favor of the defendant in line with the averments and prayer of his answer and reconventional demand, decreeing him to be the lawful owner of the property and entitled to retain possession, and decreeing the illegality and absolute nullity of the plaintiff's title, as well as those of his vendor and her author—the State; and that his demands be rejected and disallowed, *in toto*.

From that judgment the plaintiff appeals.

In view of the foregoing recapitulation of facts it is quite manifest that the decision of this case must turn upon the effect that is to be given to the original tax adjudication to the State of Louisiana on the 18th of July, 1888, as it was the first apparent divestiture of the Elder title; for if it possessed any inherent defect, or patent illegality, those claiming thereunder can not occupy any better position than their author.

And, in determining that question, we must consider the fact that, as the adjudication was made in pursuance of a current revenue law of the State which was enacted under the Constitution of 1879, the adjudicatee thereunder is bound to establish, with a reasonable degree of certainty, that all the formalities of law in assessment and sale were complied with on the pain of nullity of the title.

And, as an adjunct of said proposition, we are to consider the contemporaneous history of the transaction and the manner in which the parties in interest dealt with this tax alienation.

A conspicuous feature of the tax sale to which our attention has been attracted is that the sale was made under the revenue law of 1882, whereas the taxes were assessed in 1887 under the revenue law of 1886, which had superseded the act of 1882; and a conspicuous feature of plaintiff's title is that, notwithstanding Elder had renounced and abandoned his right, title and interest in the property in favor of the plaintiff on the 27th of August, 1890, it was not set up by the plaintiff as a muniment of his title nor referred to in his petition; and it was for the first time discovered and adverted to by defendant in his answer.

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And when its date is taken into consideration it becomes evident that same was intended to quiet and confirm the tax title; for it appears that Dora Starke acquired from the State on the 2d of May, 1890, preceding said quit-claim. And it is further of importance to notice that Mrs. Starke conveyed the property to the plaintiff *a few days after* its execution; and yet it was not recorded until the 11th of February, 1893—*more than two years thereafter*.

And it is further important to observe that, notwithstanding Elder had executed in favor of *defendant* an absolute assignment of all his rights, title and interest in the property on the 23d of February, 1891, he failed to make any mention to him of the quit-claim he had *previously executed in favor of the plaintiff on the 27th of August, 1890*.

And, finally, it must be observed that this quit-claim in favor of the plaintiff was made while the title stood in the name of Mrs. Starke, but that same was almost immediately conveyed to him by Mrs. Starke.

Not being satisfactorily explained, these *indicia* of consent and collusion would indicate an intention on the part of Elder to defeat the interest of the defendant in the property, by attempting to revive and confirm an illegal tax sale, and place it securely in the name of the plaintiff as a party interposed for his (Elder's) benefit; while, at the same time, apparently acknowledging the defendant's ownership, by transferring his interest to him, notwithstanding he had previously executed a quit-claim to the plaintiff without defendant's knowledge.

What other object could these transactions have been designed, or expected to have accomplished? It was evidently an intentional fraud on the rights of the defendant; and surely the plaintiff can not be deemed to have acquired by said quit-claim any muniment of title, considering that it merely declares that Elder thereby only abandons, releases and quit-claims to and in favor of Philip S. Sims all of his right, title and interest in said property, *without any consideration whatever*.

Put these transactions in a light most favorable to the plaintiff and Elder, they suggest the latter's attempt to defeat the plaintiff's interest in the property through the instrumentality of a tax sale of more than questionable validity, to which he had yielded a tacit consent when made, and was afterward attempting to fraudulently confirm through a person he had interposed.

And, in this connection, it should be observed that, at the time when Elder made the gratuitous relinquishment of his interest in the property to Sims, the plaintiff, the latter had acquired no claim thereto from Mrs. Starke, or any one; nor in so far as the record discloses, had he at the time, any intention or expectation of acquiring any.

The proof shows that, after Mrs. Starke had taken title from the State, to whom Elder's title had been adjudicated at tax sale, her husband, T. O. Starke, approached Elder, and requested him to purchase the property back from his wife; but that Elder declined to do so, and "brought Starke to Phillip Sims, the plaintiff, as a person who would like to buy." It further shows, that Elder told Simms, as an alleged inducement, that "it is a pretty good thing for anybody who had the money and can afford to hold on the real estate."

It was soon after this conversation that Elder executed the relinquishment of the title in Sims' favor.

The proof shows that Elder and Sims are brothers-in-law, and on terms of business intimacy; and that Colonel Starke testified as a witness, that he would not have sold the property at so low a figure, had he not been informed that Sims and Elder were brothers-in-law; and had he not "considered it a family matter."

It is conspicuous that all of these dealings and transactions occurred anterior to the sale and transfer from Elder to the defendant Walshe; and anterior to the signing of the agreement between Elder and Walshe, whereby Walshe was authorized to institute and prosecute certain suits against third parties for the purpose of perfecting title to the property.

My conclusion is that, under the circumstances detailed, Sims acquired no title to the property in controversy which he can successfully oppose to that of the defendant; because the proof makes it clear that he was but a person interposed to take title for Elder, the object of which was to defeat the interest of the defendant by means of a tax adjudication to the State.

Such traffic in tax sales, either with the present knowledge or subsequent acquiescence of the tax delinquent, has been viewed by courts of justice and given effect merely as a receipt for the taxes due and unpaid, and the tax title as enuring to the benefit of the owner of the property.

In our reports I find no case in which an attempt was made to divest an adverse title by the instrumentality of tax proceedings and sale, but there are two appertaining to the attempted divestiture of an act of special mortgage in this way.

In the former (*Austin vs. Bank*, 30 An. 691) the court said, in speaking of a tax sale, that "no government will permit its machinery, constructed to enforce the payment of public dues to the *fisc*, to be used to manipulate a fraud; and if the purchaser is a party to the fraud he must share in its punishment * * *

"The purchase by Moss was nothing more or less than a purchase by Mrs. Austin, the debtor and mortgagor, through her son, the plaintiff. The money paid, as the price at the tax sale, was only what she, as owner of the property, owed the State, and what she honestly and in good conscience ought to have paid without and before, and to prevent a sale. If she could not pay it, the debt being *exigant* and of so high a rank, she should have acquainted her creditor and mortgagee with its imminence, instead of observing the suspicious reticence which characterized her conduct. The creditor's rights, as mortgagee and vendor, can not be imperiled by the mortgagor's collusive combination with others to interpose an apparent but fraudulent obstacle in his way in enforcing those rights."

In *Beltram vs. Villere*, 4 Southern Reporter, 506, we affirmed a like principle and said:

"Under this evidence all the defences of the various defendants fall. Argument is quite unnecessary to demonstrate that these were purely and simply consent proceedings that had for their object the divestiture of plaintiff's special mortgage on the property and the investiture of Larendon with security for his unsecured demands," quoting with approval the extract we have cited from *Austin vs. Bank*, *supra*.

And those authorities are pertinent to the issue now before us in that the testimony sustains the statement that the defendant's title to an undivided interest in the property in controversy will be imperiled by his co-owner's collusive combination with others to interpose an apparent but fraudulent obstacle to the enjoyment of his rights.

But in addition to this argument comes the very forcible suggestion that Act 96 of 1882, under which the tax adjudication to the State was made on the 18th of July, 1888, in the enforcement of taxes of

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1887, had been repealed and completely superseded by Act 98 of 1886, under the provisions of which the taxes were assessed, and for that reason the sale was an absolute nullity on the face of the papers.

And I can not see how that argument can be resisted.

The nullity of the primary tax sale to the State necessarily draws to it the nullity of the title from the State to Mrs. Dora Starke—thus completely invalidating plaintiff's principal title.

In *Wilbert vs. Michel*, 42 An. 853, this court held, that the validity of a title acquired from "the State depends upon the validity of the adjudication, or forfeiture to the State; and if that is for any cause invalid, the State acquires no title and can transfer none." *Guidry vs. Broussard*, 32 An. 926; *Gatlin vs. Hutchinson*, 36 An. 350; *Atwood vs. Weems*, 99 U. S. 183; *Lee vs. Kaufman*, 106 U. S. 196; *Saunders on Taxation*, p. 313.

And in *Breaux vs. Negrotto*, 43 An. 426, we said:

"But if the State acquired no title to plaintiff's property because of radical defects in the tax proceeding, she could convey no title to the defendant under the sale," etc. Citing: *Guidry vs. Broussard*, *supra*; *Gibson vs. Hitchcock*, 37 An. 209; *Baton Rouge Oil Works vs. Dundas*, 34 An. 255; *Denégre vs. Girac*, 35 An. 952; *Carig vs. Bush and Levert*, 35 An. 1100.

My examination of the law and evidence has satisfied me that the opinion and judgment of our learned brother of the court below, in favor of the defendant, is correct.

No. 12,374.

CITY OF NEW ORLEANS VS. EUGENE S. REEMS.

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Plea Required.—To secure an appeal, the amount involved being less than two thousand dollars, there must have been a contestation in the lower court antecedent to trial and a judgment in the lower court in the matter of the illegality or unconstitutionality of a tax. *State vs. Hennessey*, 44 An. 805; *State vs. Dean*, 45 An. 441; *State vs. Tsin Ho et al.*, 37 An. 50.

APPEAL from the Second City Court of New Orleans. *Fernandez, J.*

Samuel L. Gilmore, City Attorney, and *W. B. Sommerville*, Assistant City Attorney, for Plaintiff, Appellee.

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Wall & Watt for Defendant, Appellant.

Argued and submitted February 20, 1897.

Opinion handed down March 1, 1897.

The opinion of the court was delivered by

BREAUX, J. Plaintiff sued the defendant for one hundred dollars, amount claimed for a license for the year 1896, as retail liquor dealer. There was a judgment rendered for the city from which the defendant appealed.

The appellee moves to dismiss the appeal for want of jurisdiction.

The defendant is, it appears, a wholesale merchant. He averred that he was not a retail liquor dealer and did not sell in less quantities than original and unbroken packages or barrels. He charged here, in the brief, that the license tax sought to be imposed is illegal. In the lower court no plea was filed. We have not found that the case falls within the appellate jurisdiction of this court. There is no question of law involved. The manifest purpose is to show that defendant's business, not being a retail business, can not be subjected to the payment of a retail license. This is exclusively a question of fact. While it is asserted that the law is illegal and unconstitutional, no ground of illegality or unconstitutionality is pleaded. This court has had occasion to decide, in a number of cases, in obedience to the article of the Constitution, that appellate jurisdiction would be exercised in all cases in which the constitutionality or legality of any tax shall be in contestation. In those cases the appeal comes up on the law and the fact needful to a proper determination of the question.

On appeal, questions exclusively of fact are not within the jurisdiction of the court. If we were to entertain jurisdiction of questions of fact where the unconstitutionality or illegality of the law, is merely suggested in argument at bar, the minimum limit as to amount of the court's jurisdiction would become a dead letter, and nearly all cases would become appealable, without any reference to amount. We repeat: the excepted cases, as relates to taxes in the article in the Constitution are those in which their legality, or unconstitutionality, is at issue, and in such cases the law and the fact are

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reviewable, but the facts alone, without any issue of unconstitutionality or illegality of the tax, are not reviewable on appeal. If an officer attempts to collect a tax from one who is not liable, the question of liability *vel non* (the law being, as to its validity, unquestioned) is one exclusively of fact, and appeal here is not the remedy.

In *State vs. Deffes*, 44 An. 581, this court said: We recently said in case the record discloses that there was raised in the recorder's court no contestation as to the constitutionality or legality of the city ordinance under which the appellant is prosecuted, the appellate jurisdiction of this court does not attach." The contestation must arise in the court *a qua*. *State vs. Hennessey*, 44 An. 805.

The appeal is dismissed.

MR. JUSTICE MILLER dissents.

No. 12,353.

W. H. FITZPATRICK VS. HUNTER C. LEAKE.

An adjudication by a tax collector at public auction in pursuance of Act 52 of 1884, in the enforcement of taxes for years prior to 1879, against the assessment of which the absence of no jurisdictional prerequisite has been urged, passes to the adducatee an irredeemable and unencumbered title.

APPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Dart & Kernan for Plaintiff, Appellee.

Farrar, Leake & Lemle for Defendant, Appellant.

Submitted on briefs February 19, 1897.

Opinion handed down March 1, 1897.

The opinion of the court was delivered by

WATKINS, J. This suit is the supplement of one of same title, No. 11,817, which was decided by this court, 47 An. 1648, and the plaintiff's demands rejected as of non-suit, mainly upon the ground that the objection to the tendered title was that it had been derived

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through J. Q. A. Fellows against whom a certain judicial mortgage had been once recorded, and the tax title, by which it had been discharged presumably, had not been produced and filed in evidence.

By consent of parties, and for their mutual convenience, the decree was so altered as to open the case and remand it to the lower court for additional proof.

When the case went back to the court below, the additional evidence was supplied, and a judgment rendered in favor of the plaintiff condemning the defendant to accept title to the property, and from that judgment the latter prosecutes this appeal.

The authentic act of sale on which plaintiff relies as discharging the judicial mortgage against the property in question whilst the title thereto was in J. Q. A. Fellows, bears date December 20, 1889, and shows the following facts, viz.:

That the State tax collector acting on the authority, and in pursuance of the provisions of Act 82 of 1884, advertised for sale, and sold at public auction the property in controversy, being square No. 637 in the Sixth District of the city of New Orleans, bounded by Clara, Arcadia, Marengo and Milan streets, on the seventh of November, 1889, to enforce the payment of the unpaid taxes of the years 1871, 1872, 1878, 1874, 1875, 1876, 1878, and which had been assessed in the name of J. Q. A. Fellows as the then owner thereof, when Clara A. Friend, wife of Thomas W. Montgomery, became the purchaser, for the sum and price of two dollars; and thereupon said property was adjudicated to her, and said price was received in full and final payment and satisfaction of the State, city, parish and municipal taxes due thereon, prior to the 31st of December, 1879, and same was declared to be an absolute and irredeemable title to said property.

The act of sale evidencing said adjudication was duly signed by the tax collector, and the adjudicatee, duly authorized by her husband, as well as by the notary and two witnesses; and it was duly registered in the conveyance office on the date of its execution, and in the mortgage office on the 11th of January, 1890.

The act appears to be perfectly regular in form, and to perfectly conform to the law under the sanction and authority of which it was made.

One objection which is urged by the defendant to the title is, that J. Q. A. Fellows, the tax and judicial mortgage debtor, was required

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to intervene in the act of sale from Mrs. Montgomery, the tax adjudicatee, to the plaintiff, and ratify the sale.

The answer to that is, that if all that is claimed for Act 82 of 1884 be correct in law, the judicial mortgage against the property was discharged by the adjudication to Mrs. Montgomery, and the property passed to her free of any encumbrance; consequently, the intervention of Fellows in Mrs. Montgomery's act of sale to the plaintiff was without any legal effect or necessity.

That the adjudication to Mrs. Montgomery did pass an absolutely irredeemable and complete title to the property, free of all mortgages and other encumbrances—provided there be exhibited no absolute nullities in the assessment proceedings, jurisdictional in character—is attested by frequent and repeated adjudications of this court, some of which are the following, to-wit: *In re Lake*, 40 An. 142; *In re Douglas*, 41 An. 765; *Henderson vs. Ellerman*, 47 An. 806; *Dibble vs. Leppert*, 47 An. 798.

The second proposition is, that if Fellows had any latent interest in the property at the time it was conveyed by Mrs. Montgomery to the plaintiff, same was still affected by said judicial mortgage.

But, in deciding the foregoing proposition, we held that Mrs. Montgomery's title was clear, absolute and irredeemable, without the aid of the intervention of Fellows; and the necessary consequence is, that the latter had no latent interest in the property to be affected by the judicial mortgage.

On both propositions we regard the case as being clearly with the plaintiff.

Judgment affirmed.

No. 12,394.

POLICE JURY OF DE SOTO PARISH VS. TOWN OF MANSFIELD ET ALS.

LOCAL OPTION.

The towns and cities may call an election within their respective limits to decide as to local option, one year after an election has been held under police jury ordinance as to the same matter.

SCOPE OF PARISH ACTION.

The parish action controls the lesser political division within the parish, as if the election had been held by authority of the town or city, but it can have no more effect than if the election had been held under the authority of the city or town.

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49	642
49	796
105	438
105	514
105	515

49	796
4107	207
49	796
114	773

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A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

J. B. Lee, District Attorney, for Plaintiffs, Appellees

Elam & Egan for Defendants, Appellants.

Argued and submitted February 18, 1897.

Opinion handed down March 1, 1897.

The opinion of the court was delivered by

BREAUX, J. This is an action by the plaintiff to enjoin the defendant from granting license to any one to keep a saloon and from doing any act tending to nullify the averred will of the people, as expressed at an election held in the parish which resulted in a majority against the issuance of license to follow the occupation of selling intoxicating liquors.

It is admitted that an election was legally held, under orders of the police jury, on the 11th day of September, 1895, which was regularly promulgated. It is also admitted that in the month of August, 1896, an application was made to the police jury to authorize an election to be held in the municipality of Mansfield for the granting or withdrawing license to sell liquors in the municipality, which was refused by that body.

Subsequently, it appears, that the town council of Mansfield, the parish seat of the parish, ordered the holding of an election to determine whether to grant or withhold license to sell intoxicating liquors. The election was held and carried in favor of the license. Thereupon the board of aldermen of the town adopted an ordinance to grant license for the sale of intoxicating liquors.

The injunction whereby plaintiff sought to enjoin the defendant from collecting licenses was perpetuated by the judge *a quo*. From the judgment the town of Mansfield has appealed.

The question for our determination is: An election held under the order of the police jury, having decided that intoxicating liquors should not be sold in the parish, can a town in the parish, after twelve months have elapsed since the election, decide by an election that liquors should be sold within its incorporated limits?

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The law we are called upon to analyze, in order to answer the question, is Sec. 1211 of the Revised Statutes as amended by Act 76 of 1884.

The statute provides that the police juries of the several parishes and the municipal authorities of the several towns and cities shall have the exclusive power to make such laws and regulations for the sale or prohibition of the sale of intoxicating liquors as they may deem advisable, and to grant and withhold licenses from saloons and shops within their respective limits, in accordance with the will of a majority of the legal voters. The election, however, to ascertain that will was limited to, not more than once a year.

The amending statute of 1884 contains the *proviso* that wherever a majority of the votes cast in the ward, if only a ward election has been held, or the majority of votes cast in a parish, if an election has been held for a whole parish, shall be against granting licenses for the sale of intoxicating liquors, the vote or decision shall govern the action of any town or city within the limits of the ward or parish as completely as if the election had been held by authority of the town or city.

The town or city is a separate local body from the parish. It may assent to or dissent from a local option law. The question of the sale of intoxicating liquors is left to the parishes, wards, cities and towns. To the former is given, in some respects, the greater right. Whenever an election which has been held for a whole parish is against granting licenses for the sale of intoxicating liquors, the vote or decision controls the wards, cities and towns as fully as if the election had been held by authority of the town or city.

To the latter, the wards, cities and towns, are granted the same power within the limits of each, save that these powers are subordinate to those of the parish during the term of twelve months after an election against the sale of intoxicating drinks has been carried.

As we appreciate the issues, after the lapse of the twelve months, the subordinate condition comes to a stop and an election may be called in a ward, town or city by the proper authority of the ward, town or city.

The parish action must control the lesser political division as if the election had been held by authority of the town or city, but not to a greater extent than expressed.

If held under authority of a town or city, another election is possi-

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ble after a year. It follows that an election by parish authority is subject to a similar condition within the limits of towns or cities. But it is asserted that under the statute the whole parish was bound until reversed by parish action; in fine, that license could be voted in only in the same way it was voted out, i. e. by the vote of the whole parish. In our judgment, the statute does not denote by the language used that such was the intent and meaning of the legislator. It does not appear that it was intended to entirely ignore the wards, towns and cities of the parish, if the parish action was against local option and the police jury of the parish did not choose, at any time, thereafter, to call another election.

If such was the legislative will, why were the words "as if the election had been held by authority of the town or city" inserted in the proviso?

The question was asked at bar in behalf of plaintiff. Can the lesser control and reverse the action of the greater? There is, as we appreciate, a *petitio principii* involved in the question. It is assumed that the political subdivisions of the parish are entrusted, for all times, with less authority, while, in reality, they have as much power to make such rules and regulations for the sale, or for the prohibition of the sale of intoxicating liquors, as the parishes, with the one exception we have already stated.

Without the *proviso*, the lesser political subdivision would have had the authority to order an election without waiting for the twelve months to elapse after the parish action.

The election can not bind the town to a greater extent than she could have been bound by an election under her authority, save that a *locus penitentiae* is provided in case of parish action, during which she is bound not to call an election in order, in our view, to procure, if possible, after that time, by the operation of a local option, a continuance of prohibition, and secure, as manifestly the legislator thought, with preponderance of local influence, the better condition always felt in communities in which intoxicants are not too freely used.

In our judgment, the statute does not have the effect of leaving the question entirely to the determination of the voters of the parish.

In certain cases, the wards, towns and cities have the right to decide the question in their respective limits.

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It is ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed; the demand of plaintiff is rejected and the injunction sued out is dissolved and set aside.

The plaintiff and appellee to pay costs of both courts.

No. 12,321.

EDMOND F. MIELLY VS. GEORGE SOULE ET ALS.

An anonymous publication, made in the form of a printed pamphlet, which purports to be a reply to another communication, the authorship of which is not furnished, can not be said to be libellous *per se*, as allegation and proof are required to connect such pamphlet with the complainant.

In case one's methods of teaching has been unduly criticised by a rival pretending to superiority, color is given to the excuse of making a reply; and such criminations and recriminations, if kept within reasonable bounds, are not libellous. At least, the participants are *in pari delictu*.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

B. R. Forman, Jr., for Plaintiff, Appellant.

Frank L. Richardson and Frank Soulé for Geo. Soulé, Defendant, Appellee.

D. B. H. Chaffe for L. Graham & Son and L. Graham and L. S. Graham, Defendants, Appellees.

Argued and submitted February 4, 1897.

Opinion handed down February 15, 1897.

Rehearing refused March 15, 1897.

The opinion of the court was delivered by

WATKINS, J. This is an action for libel alleged to have been committed by Prof. George Soulé, L. Graham & Son, Limited, and Lewis Graham and Lewis S. Graham, for which the plaintiff claims ten thousand dollars against the defendants *in solido*.

The defendants tendered a plea of no cause of action, and the same having been sustained and plaintiff's suit dismissed, the latter have prosecuted this appeal.

We make from the brief of plaintiff's counsel the following extract as fairly characterizing his position, upon which the test of defendants' plea must be made, viz.:

"I. That petitioner has been of good character and reputation and is engaged in the business of conducting a business college in this city.

"II. That defendant, Soulé, who is also engaged in the same business, through L. Graham & Son, Limited, and Lewis Graham and Lewis S. Graham, printed, published and circulated a pamphlet annexed to petition, Transcript, page 4, entitled 'Facts and Truth vs. Fiction and Deception,' during the year 1895.

"III. That defendants did this wickedly contriving to defame and injure your petitioner and for the purpose of injuring your petitioner in his business.

"IV. That said pamphlet is false, malicious and libellous; that said pamphlet is libellous particularly as follows:

"1. The quotation heading said pamphlet, 'Oh, what a tangled web we weave when first we practise to deceive,' is libellous.

"2. That the comparison of petitioner's circular with the circular of one who is termed a 'charlatan' teacher of book-keeping, in the seventeenth and twenty-first lines of said pamphlet, is libellous.

"3. That the application of the adjective 'smattering' to the course of book-keeping taught by your petitioner, on page 4, twelfth line of said pamphlet, is libellous.

"4. That the allegation that your petitioner's course is 'copied and worked' from the little treatise on book-keeping by P. A. Wright, 'the noted eighteen-hour charlatan teacher,' on page 4 of said pamphlet, is libellous.

"5. That the adjectives 'delusive and decoying,' on the twenty-fifth line, on the fourth page of said pamphlet are libellous.

"6. That the quotation from Dante's Inferno, beginning with the twelfth line of the sixth page of said pamphlet, as to the punishment of impostors in the tenth gulf of Hades, is libellous.

"7. That the whole of said pamphlet was printed and published by said Soulé and Graham & Son, and Lewis Graham and Lewis S. Graham for the purpose of injuring the reputation and business of your petitioner, wilfully defaming your petitioner.

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"V. That said pamphlet has been widely circulated by said Soulé, in this city and throughout the country, being freely distributed by his agents in the streets of the city and from house to house.

"VI. That your petitioner has thereby been damaged in the sum of ten thousand dollars, for which sum he prays for judgment against all of the defendants *in solido*, praying for trial by jury."

From the foregoing it would appear that plaintiff's complaint is entirely founded upon a designated pamphlet, which is entitled "*Facts and Truth versus Fiction and Deception*;" and the charge of his petition is that the defendant, Soulé, *caused* same to be printed by the defendant, L. Graham & Son, Limited, and published and circulated same, thereby contriving to injure and defame him in the prosecution of his business—the plaintiff and Soulé being engaged in the same business, that is to say, the conduct and management of a business and commercial college in the city of New Orleans.

His petition charges that "said pamphlet is false, malicious and libellous" in respect to particular quotations which are not set out in the foregoing extract.

It concludes with the statement that "the whole of said pamphlet was printed and published by the defendants for the purpose of injuring the reputation and business of petitioner," etc., and that same "has been widely circulated by said Soulé in this city and throughout the country."

It is evident, then, that the libel charged must be found in the pamphlet which is referred to and annexed to and made a part of the petition.

A copy of the pamphlet is brought up with the record. It is not addressed to any person by name, and is not signed by any one. Its objects are stated to be "a correction of misrepresentations regarding the practical courses of study pursued by Soulé College, and the exposure of the erroneous claims of another school."

It is apparent that the object of said pamphlet is, to correct some alleged misrepresentations that had been made by *some one* whose name is not furnished.

The opening sentence of it is as follows, viz.:

"A very pretentious teacher of book-keeping in this city, whom we will designate as the 'No Nonsense' teacher, has woven a tangled web long and wide by publishing many erroneous and deceptive statements of his superficial course, among which are the following:

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“ ‘Sense versus Nonsense.’ ‘In this course there is no day book writing, no old fogysm, no copying from other books. Why lose nine to twelve months’ time and expend from fifty to one hundred dollars tuition, and twenty-five to forty dollars for stationery to learn how books were kept a half century ago, when you desire to know how they are kept now, and can find it out for less than 25 per cent. of the regular cost and in less than one-tenth of the usual time!’ ”

“ ‘Most commercial colleges teach you half a dozen ways of keeping books, not one of which is practicable in business. I teach you one way, which is practicable everywhere, in every business. When you apply for a situation you are never asked, “How many ways can you keep books?” but “Do you understand book-keeping thoroughly?” Those who have gone over my *business course* can answer the latter questions in the affirmative and speak the truth.’ ”

From this we understand that the pamphlet charged to be libellous is in reply to some other and previous publication of some one else from which the foregoing extract was selected, but the authorship of which is not disclosed.

From aught that can be discovered from the pamphlet or the quoted extract, the plaintiff was entirely disconnected therewith, and there is no averment of the petition that specifically states that he was the person therein intended or represented. And but for the petition, which assumes that the plaintiff is the one intended and who was really and actually libeled, there would be nothing to connect him with the pamphlet or its alleged libellous utterances. Surely, there is no allegation in the petition to show that the defendants, Graham, had any knowledge, at the time they put it to press, that the plaintiff was in any way connected with the pamphlet. There is no allegation to the effect that this pamphlet was known, read and recognized in the city of New Orleans or elsewhere as one directed at or intended to reflect upon the plaintiff.

This is a case of libel by innuendo, without any specific charge of innuendo, nor any equivalent averment.

But if we are to so assume, from certain extracts therefrom quoted, of which one has been cited, we must likewise assume that the plaintiff’s previous criticisms had provoked the issuance of the pamphlet as a reply, a correction of certain representations as to the school and methods of the defendant, Soule.

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Without going more into detail and unnecessarily burthening our report, we will state our impression of the pamphlet to be that it is a humorous and somewhat caustic answer to a professed business circular of some competitor of the defendant, Soulé, and that the particular plan was adopted for the purpose of conveying his views efficaciously and yet as circumspectly as possible.

In our conception, there is nothing in the pamphlet to offend good taste or which is libellous *per se*. It is a heterogeneous argument on book-keeping, replete with extravagancies in language as well as in rhetoric, which were intended to amuse and ridicule the pedantry of his scholastic rival and bring his alleged pretension to superiority into ridicule.

We do not consider publications of this kind as grounding a charge of libel, particularly in view of the fact that the plaintiff was not designated therein. At all events the criticism was provoked, if not fully justified, by the animadversions of the plaintiff; for had it not been for them, the likelihood is the defendant, Soulé, would never have issued the pamphlet.

In our view the judge *a quo* correctly maintained the exception of no cause of action.

Judgment affirmed.

No. 12,488.

A. S. BADGER, RECEIVER OF THE SOUTHERN CHEMICAL AND FERTILIZING COMPANY, LIMITED, vs. THE CITY OF NEW ORLEANS.

The creditor of the city, whether by contract or otherwise, can not, because he is left off the budget, enjoin an appropriation on the budget for a legitimate municipal purpose, to which appropriation he conceives he is entitled under his contract, but the city treating the contract as void. 2 High on Injunctions, Sec. 1402 *et seq.*

Mandamus is the remedy to compel the performance of simple ministerial duties imposed by law, but the writ can not be used to enforce disputed claims alleged to arise under contract, the validity and performance of which are denied and controverted in a litigation when the *mandamus* issues. C. P., Art. 839 *et seq.*; High on Extra Rems., Secs. 25, 821, 839; 16 S. and R., p. 17.

Appropriations on the budget of the city of New Orleans, proposing payments out of the revenues of the year of debts and liabilities of previous years, are illegal, and payments under such appropriations may be enjoined by any party in interest. City Charter, Act 20 of 1882, Sec. 64; Act No. 45 of 1894, Sec. 93; 43 An. 464; 89 An. 938.

49	804
50	1075
49	804
110	949
111	351
49	804
121	762

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Breun, J., concurring: Weighing the extent of the injury which the relator will suffer if the order be withheld, and the consequence to the opposite party if the order be granted, in my mind, within its discretionary power, the court can grant or withhold the relief sought, according to the exigencies in the case, particularly for the reason that the writ of injunction applied for must serve, as far as possible under the circumstances, to safeguard whatever right the relator may have.

A court may grant a writ of injunction to preserve a right *in statu quo* for a limited time, in order that it may be litigated.

The city should not be enjoined from paying a needful amount to perform a task of greatest importance, nor should the city be compelled by writ of *mandamus* to withhold the whole amount budgeted for to meet the expenses of removing the garbage.

Watkins, J., dissenting—Blanchard, J., concurring in the dissent: The controversy is one for the control of an existing appropriation in the annual budget for the removal of garbage during the current year 1897, the relator claiming under a contract, the city disavowing the contract, claiming for itself.

If the *mandamus* is not peremptory the city, through the Department of Public Works, will be necessarily excluded from the use of the garbage fund when collected; if denied, the garbage company will be forced to discontinue its collection.

The city has not the right, summarily, to displace a contractor in the manner proposed, and it is equally evident that it can be coerced to perform a plain ministerial duty of budgeting relator's claims as provided in the ordinance.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Farrar, Jonas & Kruttschnitt for Plaintiff, Appellee.

Samuel L. Gilmore, City Attorney, for Defendant, Appellant.

Argued and submitted March 6, 1897.

Opinion handed down April 12, 1897.

The opinion of the court was delivered by

MILLER, J. The Relator demands that this court order the city of New Orleans to place upon its budget of expenses for the year 1897, to be paid from the yearly revenues, one hundred and twenty thousand dollars claimed by the relator for the company he represents, under its contract for removing the garbage of the city; the contract having been entered into in 1893 for the period of twenty years, with stipulated payments of ten thousand dollars per

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month to be provided for in the annual budgets. Pending the application for the injunction, the city prepared and published its budget, omitting the company, but placing in the proposed annual expenditures one hundred and twenty thousand dollars for removing garbage, and thereafter the relator obtained an injunction, prohibiting the city from disposing of the one hundred and twenty thousand dollars and other items on the budget, to the prejudice of his demand for payment out of the revenues of 1897. The City answered, averring the nullity and *non-performance* of the garbage contract, and prosecutes this appeal from the judgment in relator's favor.

The demands of the relator are modified in argument, and instead of payment he asks that the amount he claims be put on the budget as accruing to him, or that the amount now on it for garbage removal be ordered to be retained until the relator's rights be determined in suits to be brought by the city or by him. The City in argument urges the invalidity and *non-performance* of the garbage contract and relies on the resolution of the council declaring the contract null. It is brought to our notice, too, that there is a pending suit in the United States Circuit Court brought by the relator asserting his right under the contract, and in which suit the city relies on its defenses. It is thus manifest the binding obligation of the garbage contract is controverted by the city, and is at issue in the pending litigation in the Circuit Court.

Modified as are the demands by the argument, it is clear that the relief he asks at our hands is in aid of the contract obligation he asserts, disputed as is the obligation by the city through its council and in the courts. If we give the relief we place at the relator's disposal, should he eventually obtain judgment, the amount he claims under his contract; we take from the city to the same extent the control of its budget and the control of its revenues required for the municipal functions. If we give this relief we necessarily give a disputed contract recognition, and make provision to secure performance by the city. The question confronts us at the outset, whether by *mandamus*, restricted as it is to enforce purely ministerial duties, with all the aid afforded by the injunction, we can make obligatory on the City even to the extent claimed an alleged contract the existence of which is denied, and force the City to place on its budget the amount it refuses to recognize.

In our present discussion we deal first with the proposition to en-

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join the City from disposing of the one hundred and twenty thousand dollars now on the budget for garbage removal, not put there for the garbage company, but to be expended by the city through its ordinary instrumentalities for the removal of garbage. All can appreciate that items placed on the budget for the specific purposes stated may be protected from diversion by the parties in interest. It is equally appreciable that funds placed on the budget, destined by law to the satisfaction of a class of creditors, may by injunction be preserved from any application to any other class. See the case of Barber Asphalt Paving Company vs. City of New Orleans, 43 An. 464, and other cases of that type. But in this case there is no provision whatever on the budget for the relator. What is asked in effect is, that the injunction shall restrain the application of an amount which is on the budget, but not for him, to which he conceives he is entitled and should, in his judgment, be allotted to him. Under the form of an injunction, he, in effect, asks that provision be made for him on the budget, not, it is true, that it shall be ordered paid to him, but none the less, that it shall be placed and retained on the budget to abide his rights. We think it must be recognized as familiar, that creditors can not in advance of judgment with exceptions unnecessary to be stated, enjoin the disposition of the debtor's property. In Mr. High's comprehensive chapter on the subject of injunctions to municipal corporations he has exhibited the uses of the writ. The misappropriation of municipal funds is, of course, prominent in his discussion. Thus, he instances appropriation of county funds in aid of a private corporation without authority of law; donations without legal authority for school houses; the disposition by county commissioners of the surplus revenues in an illegal and unauthorized manner, and similar cases are stated by him as affording the basis of an injunction. But there is no recognition in the chapter, of an injunction of a creditor to restrain the disposition of the corporate funds. As to creditors we understand the general principle to be that injunction to restrain the debtor's control of his property can not be obtained. "It is to be observed, however, that the jurisdiction (*i. e.*, of injunction in behalf of creditors) is not exerted in favor of mere contract creditors, or creditors at large, whose claims are not reduced to judgment, and in the absence of statutory provisions authorizing the relief courts will not interfere by injunction to

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restrain the debtor from any disposition of his property, however fraudulent the disposition he may seek to make," etc. 2 High, Chapter 27. The answer that the creditor of the city of New Orleans dependent on the annual revenues for his payment and with a contract right to that payment is not a "mere contract creditor" does, in our view, withdraw him from the general principle announced by the text writer. Every creditor of the city for labor, supplies, or in other respects, is entitled by law to be placed on the budget for the year in which his debt accrues, but that, in our view, would not, if he were omitted, entitle him to an injunction to restrain the City from making provisions on its budget for the annual expenses of municipal government. Hard as his condition might be if omitted, he could claim no such injunction as is asked for at our hands, but would be remitted to other relief. Again, in exceptional cases, it is the judgment creditor on whose behalf the injunction, issues to restrain the debtor's disposition of his property. The judgment establishes his right. Here, it is asked by one who has no judgment, whose asserted debt is disputed and is the subject of pending litigation. With the best consideration we have been able to give this part of the case, we cannot see our way clear to grant the injunction. If there is any warrant for enjoining a municipal corporation from making its annual budget and providing for municipal expenditures, because there is an omission of a creditor with a contract stipulating he shall be put on the budget, but the validity and performance of whose asserted obligation the City disputes and contests in court, the authority has eluded our research. If we, in view of the hardship of this case, pressed on us in argument, issue the injunction, we make the precedent repugnant, as we think, to settled principles and apt to prove extremely embarrassing in the future.

But the injunction in this case is the mere auxiliary of the *mandamus*, and the difficulty in respect to that remedy is, in our view of the most serious character. The *mandamus* issues only to enforce the purely ministerial duty imposed by law. It is said here, the duty arises from an ordinance of the council, and that the ordinance is a law. The ordinance authorized the contract. The ordinance followed by the agreement creates the commutative contract; the company is to remove the garbage in the mode and under the conditions stated in the contract; on performance of the work by the contractor

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he is to be paid by the city. The duty of payment arises from the contract, or rather its performance. Our research confirms us in the opinion that no *mandamus* can issue to enforce an obligation, which, if it exists, simply arises from a contract and its faithful performance. We find the law epitomized thus: "Duties imposed on a corporation, not by express law or by the conditions of its charter, will not be enforced by *mandamus*; the use of the writ is limited to obligations imposed by law." High, Secs. 321, 339. We have been inclined to think it elementary that the duty to be enforced must be imposed by law, not contract. In the much discussed case of *Kendall vs. United States*, 12 Peters, 554, devoted, it is true, in large part to other questions, the right to the *mandamus* was placed on the ground of the duty sought to be enforced, was purely ministerial, imposed by law. Take the array of cases in *Bouvier*. They refer to writs of *mandamus* to enforce duties created by law. In our reports we have the *mandamus* to compel the levy of a tax directed by law; the bank required by its charter to exhibit the list of its shareholders may be compelled by *mandamus* to do so; the treasurer required by the Constitution and laws to pay the auditor's warrants on specific appropriations may be constrained by *mandamus*. *Watts, Templeton et al. vs. Police Jury of Carroll*, 11 An. 141; *Hatch vs. Bank*, 1 Rob. 470; *Cockburn vs. Bank*, 13 An. 289; *Homerich vs. Hunter*, 14 An. 225, and others, but none involving a mere contract obligation. In the cases cited by the Relator of writs of *mandamus* to compel the levy of a tax to pay municipal bonds, the basis for the writ has been the law under which the bond issues, directing the tax to be levied. *Dillon on Municipal Bonds*, Sec. 25; *Von Hoffman vs. Quincy*, 4 Wall. 555; *Butz vs. Muscatine*, 8 Wall. 577. It seems to us the conclusion must be the writ follows and enforces the ministerial duty created by the law, and will not command the supposed duty arising only from contract.

Again, the issue on the writ of *mandamus* confined to the enforcement of the obligation arising from the law does not admit of the inquiry into the asserted violation of a contract. In this case the proof tendered by the City to show the non-performance of the contract was included. If not performed there was no obligation of the city. We are asked, then, to enforce, though only to a limited extent, a contract the defences to which are alleged, and the enforcement is asked in proceeding by *mandamus* in which the defences can

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not be urged. It seem to us the inability to urge any defences, though they may exist, is in itself suggestive that the *mandamus* is not the remedy for the asserted wrong of the relator. We find the principle running all through the text-books, in connection with another restriction on the writ, that "*mandamus* is not an appropriate remedy for the enforcement of contract rights, and it is not the province of the writ to settle differences of opinion between municipal authorities and claimants as to the amount due for services rendered; all disputed claims or accounts against the municipality should be referred to the jury and to the ordinary processes of the courts, and in the foot-note of the text-book is the suggestive reference to a Pennsylvania decision, that after judgment against the municipality on the disputed demand the writ may issue to enforce its payment. High Extraordinary Remedies, Secs. 389, 321, 25; 16 Sargeant & Rawle, p. 17. In the same line the author states that pending litigation in another court in which the relator has invoked relief will be a bar to the writ of *mandamus* sought by him. Sec. 25. If in answer to all this it is said the writ does not seek to compel payment to the garbage company, still it is none the less true that the relief asked is a step toward compelling that payment. If the remedy cannot be invoked for performance of the contract, every advance in that direction is forbidden under a writ of specific and restricted scope. If the writ issues the court intervenes in a controversy of the City with its creditor as to the validity of his contract with the City, and notwithstanding the denial of any liability on its part, and its pending litigation on the subject in the United States Circuit Court directs the city to place the disputed amount on its budget, in legal effect setting aside the fund for its payment. If, as we think it clear, that contract obligations and disputed claims can not be the basis of the writ of *mandamus*, then what we are asked to do, though short of ordering payment, is extending the writ of *mandamus* beyond the well-defined limits of the law. That we do to-day we may be called on to repeat to-morrow. The result would be to transfer to this court every issue between the city and its creditor, claiming under a contract stipulating he should be put on the budget, and irrespective of all defences of the city, we should be called on to control its budget so as to make place on it for all claims disputed by the city and resisted in the courts. With the most patient consideration we are unable to give our sanction to

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such use of the writ of *mandamus*, confined by universal acceptance, we think, to purely ministerial duties and not to end or aid disputed contract obligations.

There is another aspect of this case. We find on this budget of 1897, items of expenditure of the year 1896. Under our revenue system the expenses of the year must be paid from the revenues of that year. It is a salutary provision to check municipal extravagance by forbidding the anticipation of the revenues of future years to pay the debts of the present. In this respect the budget proposes an unlawful diversion of funds, the prevention of which is the appropriate office of the writ of injunction. High on Injunction, Sec. 1269. Although the relator, in our view, is not in position to demand payment, his right of payment from the revenue of 1897 being contingent on the judgment he may obtain, we think, sufficient to entitle him to the injunction against the application of the revenue of 1897 to pay liabilities of 1896.

A large part of the discussion here has been directed to the assertion of power in the council to end a contract by resolution. This and other phases of the argument, we pass in a decision turning altogether on the remedy sought by the relator. We have not been inattentive, either, to the consideration pressed on us with great earnestness of the effect of leaving the relator off the budget of 1897, and thus it is claimed excluding him practically from all provision for payment of his demand under a contract of the city, on the faith of which it is stated the Garbage Company has expended a large amount for the plant and the equipment necessary for the performance of the contract. If it be determined in the appropriate proceeding the city has any defence against this contract, the relator will have to bear his loss. If, on the other hand, it is ascertained the City has no cause of complaint, the relator will be left only with his suit for damages admitting, if recovered, of no satisfaction from the revenues of this year, because the Council proposes to apply them to other purposes, and denied any recourse on the revenues of the future by the law devoting the annual revenue of each year to the year's expenses and excluding all other demands. While we appreciate this argument the question of the right to the remedy sought must be submitted to other tests. If the relator stood at the bar of this court with judgments fortifying his contract rights, his position would be sensibly altered. If after he presents himself

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with such judgment establishing his right to the instalments to be paid to him each and every month according to his contract, this court would be called to exert its control as far as practicable over the budgeted revenues of the year, so as to secure his rights and the observance of the law requiring the application of the year's revenues to the debts of the year. Our judgment on the remedy alone will leave the relator the full benefit of other modes of relief.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed in so far as it directs the city to place the relator on the budget of 1897, as claimed by him, and enjoins the payment of the one hundred and twenty thousand dollars now on the budget, but in so far as said judgment decrees that the city be enjoined from applying the revenues of 1897 to the items on the budget for debts or expenses of 1896, that the judgment of the lower court be and is hereby affirmed.

NICHOLLS, C. J., concurs in the decree.

CONCURRING OPINION.

BREAUX, J. The respondent and the relator agree that the issue before us for determination was not whether the contract with the relator was one which the city had authority to make, nor whether the city could recall it by ordinance or should sue to have it decreed null.

All these questions are pending before another court.

It is unnecessary for the purpose of the decision of the questions before us to express an opinion upon the merits of the controversy which is not before us.

The issues here are limited to the *mandamus* sued for and the injunction.

As to the first, the *mandamus*, the question was whether the relator was entitled to the writ of *mandamus* to compel the city to appropriate in its annual budget of expenses for the year 1897 the sum of one hundred and twenty thousand dollars, to be paid to the relator in monthly instalments of ten thousand dollars, in accordance with the terms of the contract.

As to the second, the injunction, the question is whether the relator is entitled to the writ of injunction prohibiting the city from disposing of the amount just stated, until the city shall first have provided for the payment of that amount.

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Recurring to the writ of *mandamus*.

It does not issue *ex debito iudicis*.

It may be withheld if there is other specific and adequate remedy.

The proposition is fully supported by authority, that the power to issue that writ or to withhold it, rests within the sound discretion of the court.

The contract upon which the application is founded is already the subject of another suit. The right of the relator to recover anything under the contract is questioned.

It is well settled that *mandamus* lies to compel the payment of a judgment, but here, before any judgment has been rendered upon the claim in another court, it is sought to compel the city to place upon its budget an amount to meet the claim. In other words, it is sought to have an amount budgeted and held to be applied to the payment of relator's claim in case a judgment be obtained before another court.

The city, we are informed, before another court pleads that the contract is *ultra vires*, and sets forth, in its defence, a number of other grounds of nullity.

Prior to a determination of these issues the court is called upon to make a decree as if there was no controversy as to the right claimed under the contract.

May it not be said in response to this demand that repeatedly it has been held that courts will refuse a *mandamus* if the right of the one applying therefor is not clear.

The vigorous defence, we infer, made in another tribunal, divests the right of the conclusiveness it possibly would have if the many grounds of nullity were not urged.

It has also been decided in a number of cases that *mandamus* will not be allowed in cases involving numerous questions of law and fact.

To sustain a *mandamus* the applicant must have a clear legal right.

The People vs. Croton Aqueduct Board, 26 Barbour's Supreme Court Reports, citing 18 Barb. 443, and 10 Wend. 365.

Applying this principle, the Supreme Court of Illinois, in People vs. Chicago, 53 Ill. 427, held: the relators having resorted to another court to adjust and enforce the rights of all concerned, it would not exercise jurisdiction in the mode desired by issuing the writ of *mandamus*.

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Another question arises, not controlling it may be, yet worthy of some consideration.

The purpose of the writ is to compel the respondent to make an appropriation in accordance with the contract. The effect may be to compel the city to return to a contract and have it enforced, notwithstanding the grounds alleged.

In that case, is it not within the authority of the court to withhold or grant the writ of *mandamus* according to the justice of the case as made to appear by the facts exhibited?

Weighing the extent of the injury which the relator will suffer if the order be withheld, and the consequence to the opposite party if the order be granted, in my view, within its discretionary power the court can grant or withhold the relief sought according to the exigencies in the case, particularly for the reason that the writ of injunction applied for will serve as far as possible, under the circumstances, to safeguard whatever right the relator may have.

A court may grant the writ of injunction to preserve a right in *statu quo* for a limited time in order that it may be litigated, and this may be granted without expressing an opinion or without having the means of expressing an opinion as to the legality of the claim.

In my judgment the city should not be enjoined from paying needful amount to perform its Augean task, a task of the greatest importance in this climate and at this season. Nor should *mandamus* issue to compel the city to withhold the whole amount budgeted to meet the expenses of removing the garbage, for a company, be the cause what it may, not at present employed in removing the garbage.

I concur in the decree.

DISSENTING OPINION.

WATKINS, J. This is a proceeding by *mandamus* on the part of the relator, to compel the City Council, representing the respondent, to appropriate in her annual budget of expenses for the year 1897 the sum of one hundred and twenty thousand dollars, to be paid relator in monthly instalments of ten thousand dollars, in accordance with the terms of its contract, for the year 1897, made under and in pursuance of Ordinance No. 7860, C. S., bearing date August 3, 1893, same being for the collection, removal and disposal of garbage from the streets and public places of the city of New Orleans.

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This suit was filed in the District Court on the 11th of December, 1896, and served on the Mayor on the same date, commanding him to show cause why the city should not comply with the relator's demand, and the alternate writ was made returnable on the 21st of December, 1896.

On the trial in the lower court there was judgment in favor of relator, and the city as respondent prosecutes this appeal.

The averments of the relator's petition are that on the 12th of September, 1893, the city of New Orleans entered into a contract with Edward G. Schlieder for the removal and disposal of garbage, by virtue of and in accordance with city Ordinances Nos. 7860 and 7992, C. S., and Resolution No. 8660, C. S., and that on the 29th of March, 1894, he transferred and assigned the same to the relator.

That thereupon the fertilizing company prepared itself and provided the means for entering upon the performance of its engagement, and to that end purchased property and thereon erected all the necessary buildings and provided itself with all the needed machinery, apparatus and appliances necessary, together with the necessary wagons, carts, mules, horses, etc., at an aggregate expense to itself of about three hundred thousand dollars.

That, after due proclamation by the mayor, and in keeping with the terms and stipulations of its contract with the city, it entered upon the discharge of the obligations thereof about the 1st of August, 1894, and has continued to discharge and perform same to the date of filing this suit; and that the city regularly paid the monthly allowances due to the company up to and including the month of May, 1896, but has since that time neglected and refused to pay that sum or any other sum on that account.

The further averment is, that under the contract it was provided that for five years after its date the sum of six hundred thousand dollars should be paid in sixty equal instalments of ten thousand dollars each, and that all of said payments were to be made out of appropriations to be made in the annual budget of expenses of the city.

That Sec. 93 of Act 45 of 1896—the charter of the city—provides that the City Council shall, once in twelve months, before fixing and deciding upon the amount of taxes and licenses to be assessed for the ensuing year, cause to be made out a detailed estimate exhibiting the various items of liabilities and expenditures, including the

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requisite amount for all expenses of the city during the said year; and shall cause the same to be published for at least ten days in the official journal of the city; and such rate of taxation, as provided by law, on every hundred dollars of valuation, shall thereafter be fixed and assessed, as together with other revenues of the city may be necessary to meet the estimated liabilities and expenditures.

That the adoption of this detailed estimate shall be considered as the appropriation of the amount therein stated, and that the comptroller shall not audit, nor shall the treasurer draw or sign any checks upon the fiscal agent for any claims unless an appropriation therefor has been made in accordance with that act.

That the City Council has caused the detailed estimate above referred to, to be published as the law requires, but that no provision is therein made for the relator under its contract, for 1897, notwithstanding it was the duty of the city to provide therefor, in the said budget for 1897, the sum of one hundred and twenty thousand dollars—same being the amount due the relator under its contract for the year 1897, and that it is without remedy in the premises, save by the writ of *mandamus*.

The further averment is then made that, in order to excuse and justify its conduct in the premises, the City Council at one time pretended that relator's contract was null and void *ab initio*, and at another time that it had, subsequently to its execution, terminated and ceased to have any binding force because of the company having failed and refused to gather and remove garbage in accordance with the stipulations thereof; while, on the other hand, that of the relator was, and it charges the truth to be, that the contract was made and entered into in pursuance of and after due compliance with all the forms of law, and is valid and binding in all respects, and that all obligations and duties thereby imposed have been regularly and fully performed in all respects.

The relator further alleges that the city has no other means of paying her debts and contract liabilities than a limited power of taxation granted to her by her charter, and that if the proceeds thereof, together with other municipal revenues, be entirely disposed of and appropriated by the City Council without setting aside the amount it requires to satisfy its demands for the current year, there will be no funds available for that purpose, and that a judgment against the the city would be unavailable and uncollectible and of no value

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whatever. And, in conclusion, the relator avers that "practically the city of New Orleans, in view of its limited power of taxation, its limited revenue and its intention, as shown in said published estimate of expenditures, to dispose of the whole of the revenue of 1897 without providing for the claim of relator, should be "practically regarded as an insolvent debtor, and that the writ of *mandamus* prayed for should therefore issue, and after due proceedings, be made peremptory, *without prejudice to the rights of the city, if any she have, by appropriate judicial proceedings, to urge the invalidity of or to secure the annulment of the said contract.*"

The respondent returns, substantially, that the City Council attempted, by Ordinance No. 7860, C. S. (the one referred to by the relator), to make a contract with the relator for the removal and disposal of garbage within the garbage district designated in the same, which was divided into seventeen districts, the contract being for the period of twenty years, and bearing date 29th of August, 1898.

It then reiterated, substantially, the statement made by the relator, and then represents, that about the 1st of June, 1896, complications arose between the company and the city in regard to the manner in which the former was gathering and removing garbage, when, at the instance of the Board of Health, prosecutions were commenced against the company's employees for the purpose of preventing the practice indulged in by the relator "of dumping garbage upon lots and squares in the city."

It then states that the health authorities subsequently called upon the city and demanded that steps be taken by the city for the removal of all offensive matter from the markets, streets and public places of the city; and that thereupon the City Council—having made a special investigation of its own, as to the manner in which the relator was collecting and removing garbage and operating its plant—adopted Ordinance No. 12,537, C. S., on the 30th of July, 1896, "declaring the plant of the Southern Chemical and Fertilizing Company, Limited, and the business of collecting, removing and disposing of garbage, as conducted by said company, a public nuisance, and directing the Commissioner of Public Works to immediately take charge of the collection, removal and disposal of garbage."

It further returns that, since the adoption of that ordinance "the department of public works has discharged the duty of collecting,

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removing and disposing of the garbage at an average monthly cost of seven thousand four hundred and twenty-two dollars and twenty-three and a half cents."

Reference is then made to the present suit, in which details are given similar to those we have outlined from the relator's petition, and then follows the purport of its exception to the effect, that the petition discloses no cause of action, and of the answer to the effect, that the contract was absolutely null and void, and that, if valid, it had been violated. Brief, p. 10.

Then comes the following pertinent allegation, viz.:

"That the writ of *mandamus* could not issue to compel the performance by the city of a contractual duty, especially when the existence of the contract was denied, and where the party applying for the *mandamus* has adequate remedy at law; and that as the city of New Orleans, under the power delegated to it by law, had declared the plant of the Southern Chemical and Fertilizing Company, Limited, and the business of collecting, removing and disposing of garbage as carried on by said company to be a public nuisance, and had ordered its own officers to discharge the duty of collecting, removing and disposing of the garbage, the finding of the City Council was conclusive until set aside by a court of competent jurisdiction in a proper proceeding and on proof that Ordinance No. 12,537 was an unwarranted and unreasonable exercise of municipal authority."

It then declares, that "*subsequent to the filing of the petition for mandamus, to-wit, on the 16th of December, 1896, the budget of revenues and expenses of the city of New Orleans for the year 1897 was finally approved.*" *Vide* Ordinances Nos. 12,936 and 12,937.

This is the case as presented upon the petition and return in the *mandamus* proceedings.

The contract, in form and effect, as set out in the petition is admitted in the return, coupled with the averment (1) that it was *ultra vires* and void *ab initio*, and (2) that if not void, it was terminated by the company's failure to gather, remove and dispose of garbage in keeping with its provisions; and (3) that the city, at the instance of the health authorities, having found and declared that the manner in which the company was neglecting and failing to remove garbage constituted a public nuisance, had undertaken to abate the same through the instrumentality of the department of public works.

Not denying, but on the contrary affirming the facts to be as stated

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in the relator's petition in respect to the budget of 1897, the respondent plainly states, that the city has disavowed and repudiated its contract through the instrumentality of its own *ex parte* action in passing and promulgating an ordinance declaring the company to have been derelict in its duty, and the operation of its plant a public nuisance; and then retorts by saying the writ of *mandamus* can not issue against *the city* to compel its performance of a contractual duty, especially, as in this case, when *its existence* is denied.

From the foregoing statement it is evident that the two questions presented for consideration are (1) whether the city can, in the manner proposed, *dispossess* the fertilizing company of the franchise of which it became the owner under the contract of September 12, 1898, and (2) this attempt having been made by the city authorities, can she be kept to her engagements under her contract, and coerced by *mandamus* to make provision in the annual budget of expenses and appropriations for the current year 1897 for the sufficient amount of money to meet the monthly instalments of ten thousand dollars that are due and those which are to become due thereunder during the year 1897?

The proposition of the City Attorney seems to be that the City Council considered the fertilizing company in the light of an unfaithful servant, and exercised the right of turning it away, and that any right the company has for its restoration to the service and employment of the city, being purely contractual, specific performance thereof can not be enforced by *mandamus*.

On the contrary, the contention of the relator is that the city advertised and sold as a public franchise the exclusive right to gather, remove and dispose of garbage within certain designated municipal districts of the city and in a manner particularly described, and that same was adjudicated at public auction at a competitive bidding to one E. G. Schlieder for the period of twenty years, in exact compliance with an ordinance of the city, which particularly and exclusively dealt with that subject, and as the city was authorized to do under the statutes of the State on the subject of garbage and the provisions of the city charter then existing.

That in pursuance of the said ordinance and the law, the city entered into a contract with said Schlieder, adjudicatee, for the removal and disposal of garbage, by the terms of which she promised and agreed to pay the sum of one hundred and twenty thousand

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dollars, annually, for the first five years from and after the 29th of August, 1898; for the second period of five years one hundred and thirty-four thousand dollars per annum; for the third period of five years one hundred and fifty thousand dollars per annum; and for the fourth period of five years one hundred and sixty-five thousand dollars per annum, said sums to be paid in equal monthly instalments.

That Schlieder subsequently assigned all his rights under the ordinance, adjudication and contract, to the Southern Chemical and Fertilizing Company, Limited, a corporation organized under the laws of the State for the express purpose of collecting the garbage of the city and manufacturing same into fertilizers; that it established a plant for that purpose and procured all the necessary paraphernalia for the purpose at an outlay of three hundred thousand dollars, and began and continued operations thereunder without serious objection or hinderance of any kind until about the 1st of June, 1896.

Predicated, substantially, on this statement, the contention of relator's counsel is, that it is not in any sense a servant or laborer for hire of the city whom she may turn away at pleasure, but an independent proprietor and adjudicatee of a public franchise who has contracted with the city to perform for the city a service in the removal of garbage, for a stipulated consideration in money, and for the payment of which the city in her ordinance and contract specially provided, that provision should be annually made in her budget of expenses and appropriations.

That the necessary and legal consequence is, that the only questions which may have arisen or can arise between the company and the city are (1) the right of the city to repudiate her agreement to provide for and make payments of the instalments of the price as they fall due, and (2) the right of the relator to compel the city to keep to the covenants of her ordinance and contract and annually provide therefor in her budget if she refuse.

But before proceeding to discuss and dispose of these propositions, it is necessary that a statement should be made of the injunction which the relator applied for and obtained *pendente lite* as an ancillary proceeding which it deemed necessary for the purpose of preserving the *status quo* of the fund, and prevent its disposition or disbursement until a final judgment should be rendered on the principal demand.

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The petition for injunction, substantially, states that after the cause was set down for argument in the lower court, but before it was argued, the relator filed same, in which he reiterated in substance the averments of the petition for *mandamus*—setting forth the then attitude and situation of the case—and stated that notwithstanding the pendency thereof the respondent had, *since the service of the alternative writ*, passed ordinances, commonly known as 12,986 and 12,987, O. S., being her budget of intended and estimated expenditures for the year 1897, distributing all the revenues of said year without making any specific appropriation therein for petitioner's debt, but inserted therein an appropriation of one hundred and twenty thousand dollars for "removing garbage (in) 1897," and also an appropriation for "removal of garbage in 1896" of forty thousand dollars.

The further averment is made, that until recently previous to that date it had hoped and believed that the appropriation of one hundred and twenty thousand dollars for removing garbage of 1897 was intended as an appropriation in its favor to be held in abeyance until the decision of this cause—it being for exactly the same amount as is therein demanded—but that *said two ordinances destined it to the use and for the payment of the Commissioner of Public Works*, and to other persons than the relator, for expenses incurred in the removal of garbage during 1897, and that if said ordinances be carried into effect, and the money thereby appropriated be paid accordingly, *all funds applicable to the payment of relator's contract and presented for adjudication in the mandamus proceeding will be diverted and squandered, and relator irreparably injured, unless stayed and restrained by the writ of injunction.*

The further averment is made that it is expressly provided by Act 30 of 1877 (Sec. 8) that the revenues of the several parishes and municipal corporations in this State, of each year, shall be devoted to the expenditures of that year, provided that any *surplus* of said revenues may be applied to the indebtedness of former years, and that therefore the appropriation of *forty thousand dollars for the removal of garbage in 1896* is illegal and absolutely null, void and of no effect until and unless any and all demands against the revenues of 1897 shall have been paid, and that relator has the legal right and *insists that its legal demands shall be met and paid before any sums whatever are appropriated for the payment of any obligation of any year prior to 1897* out of the budget for that year, and to that end

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and effect the relator demanded an injunction for the purpose of *preventing said ordinances being carried into effect, and the said sums of one hundred and twenty thousand dollars and forty thousand dollars being disbursed and diverted during the pendency of the mandamus proceedings.*

The respondent sought to have the injunction dissolved on giving bond, but failing in that she filed an answer denying that relator has any interest in the appropriation of either the one hundred and twenty thousand dollars or the forty thousand dollars in the budget of expenses for the year 1897. The suit was argued and submitted on the merits of the *mandamus* and injunction, and judgment was rendered in favor of the relator, making the *mandamus* peremptory and the injunction perpetual, hence both are embraced in the respondent's appeal.

The facts that need be stated are few and simple. That the city Ordinance No. 7860, relative to the removal of garbage, was regularly passed and promulgated, there is no question, and there is none that it was a duty imposed upon the city by the terms of her charter as well as by the general law relative to the exercise of the police power to provide for the removal of garbage for the better sanitation and preservation of the health of the city. There is none as to the fact that said garbage ordinance was authorized by the special provisions of the law with reference to the removal of garbage as well as by the provisions of the legislative charter of the city, and there is none as to the fact that the proposed contract and franchise therein outlined was regularly advertised, sold and adjudicated to Schlieder and assigned to the relator after the city had bound herself to the performance of her part of its stipulations in a solemn notarial act and had executed and delivered her obligations conformably thereto.

The following is the ordinance, reproduced in its entirety, for the purpose of accuracy and to avoid any question of doubt or misconstruction, viz.:

" MAYORALTY OF NEW ORLEANS, }
" City Hall, August 3, 1898. }

" No. 7860, Council Series.

" An Ordinance to Provide for the Collection and Disposal of Garbage, etc., by the Adoption of a System therefor, and the Entering into a Contract therefor for Twenty Years, and Providing Penalties for the Violation of this Ordinance.

" WHEREAS, the method of removing and disposing of garbage

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heretofore used in this city has proved entirely inefficient, insufficient and objectionable to the public as well as to private citizens; and

"WHEREAS, the fast-increasing growth of the city and increase of population demand the adoption of some modern and efficient method of garbage removal, such as is in use in other cities of the United States; and

"WHEREAS, the Board of Health has recommended that the city of New Orleans take steps to provide some such system:

"SECTION 1. *Be it ordained by the Common Council of the city of New Orleans*, That the Comptroller be and he is hereby directed to advertise for ten days, according to law, for sealed proposals for the collecting, removing and disposing of all garbage from private residences, business places, streets and alleys, and all public places within the limits of the city of New Orleans, as described in the garbage districts hereinafter enumerated, for twenty years, by some improved system similar to those in use in other cities of the United States.

"Every bidder making proposals under this ordinance shall state the price per annum, divided into four periods of five years each, at which he is willing to contract therefor under the terms of this ordinance.

"All bids received by the Comptroller shall be reported to the City Council.

"The City Council shall award the contract to the bidder whose price is most satisfactory to them, but this award shall not be final until the successful bidder has presented a system of disposing of refuse vegetable and animal matter, including dead animals, in a manner which is scientific and sanitary, disposing of whatever is injurious to health and discomforting to the human race, at the same time preserving whatever is valuable in the material aforesaid. The City Council reserving the right to reject any and all bids.

"SEC. 2. *Be it further ordained, etc.*, That each bidder, prior to submitting his bid, shall deposit with the Treasurer the sum of twenty-five thousand (\$25,000) dollars in United States currency, shall file a receipt therefor with the Comptroller, as evidence of his qualification to bid. This deposit is required as an earnest of good faith upon the part of all the bidders, and all deposits shall be returned to all unsuccessful bidders immediately after the final award by the Council, and the deposit of the successful bidder shall be retained by the Comptroller until the notarial contract herein provided for is signed, and said deposit shall be forfeited to the city of New Orleans, in case said adjudicatee shall fail to enter into said contract and furnish the necessary bond. When said contract is signed and bond given the deposit shall be returned to the adjudicatee.

"SEC. 3. *Be it further ordained, etc.*, That the city of New Orleans, for the purposes of collecting and disposing of all garbage, shall be divided into seventeen districts, to be known as garbage districts, which districts will be as follows, to-wit:

"First. Thalia to Felicity Road, river to Claiborne.

"Second. Thalia to Julia, river to Claiborne.

"Third. Julia to Canal, river to White.

"Fourth. Canal to St. Louis, river to White.

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- "Fifth. St. Louis to St. Philip, river to Broad.
- "Sixth. St. Philip to Esplanade, river to Hagan avenue.
- "Seventh. Esplanade to Elysian Fields, river to Broad.
- "Eighth. Elysian Fields to Enghein, river to Claiborne.
- "Ninth. Enghein to Louisa, river to Claiborne, Louisa to Poland, river to St. Claude.
- "Tenth. Felicity Road to First, river to Claiborne.
- "Eleventh. First to Toledano, river to Claiborne.
- "Twelfth. Toledano to Napoleon avenue, river to Dryades.
- "Thirteenth. Napoleon avenue to Peters avenue, river to Dryades.
- "Fourteenth. Peters avenue to Lower Line street, river to Carondelet.
- "Fifteenth. Jackson to river, Atlantic avenue to Powder.
- "Sixteenth. Lower Line street to Carrollton avenue, river to Seventh.
- "Seventeenth. Carrollton avenue to Upper Line street, river to Seventh.

"The above territory shall comprise the limits of the garbage districts of the city of New Orleans, and the provisions of this ordinance shall apply to same, except as to dead animals, which shall be removed by the contractor from places wherever dairies or stables are located outside of said limits.

"SEC. 4. *Be it further ordained, etc.,* That the word 'garbage,' as used in this ordinance, shall be construed to mean house and kitchen offal, and all refuse matter not excremental, whether solid or liquid, and composed of animal and vegetable substances, including dead animals, same coming from public or private premises of the city, and not destined for consumption as food. No ashes, dirt, or other substance foreign to garbage shall be covered by this contract, except as hereinafter provided, and it shall be unlawful for any occupant or occupants of any premises in the city of New Orleans to mix any such ashes, dirt, or other substance foreign to garbage with the garbage to be removed from said premises as herein provided, under a penalty of not less than five nor more than twenty-five dollars fine for each offence, or imprisonment for not more than thirty days.

"SEC. 5. *Be it further ordained, etc.,* That the contractor shall, by proper notice in writing, issued to occupants of premises in the several garbage districts, inform the occupant or occupants of such premises of the hours when garbage will be removed from said premises, and it will be the duty of such occupants of such premises to have all garbage ready for removal therefrom at the hours so designated by the contractor for such premises, under a penalty of not less than ten dollars fine or imprisonment for not more than ten days for each offence.

"SEC. 6. *Be it further ordained, etc.,* That it shall be the duty of the contractor to collect and remove from all private residences, business places, streets and alleys, and all public places within the limits of the garbage district aforesaid, all slops, offal, garbage, dead animals, in suitable vehicles or carts, and other animal and vegetable matter in inclosed water-tight metallic vehicles or carts, so that no drippings or refuse can be dropped on the streets, alleys or public places in the city, to a certain point or points, to be approved by the City Council, where the said contractor shall have erected, on land

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owned or leased by him, a first-class plant, including the necessary buildings and machinery for the destruction by fire or the reduction and conversion of said material so removed into merchantable products. Said plant shall have a capacity sufficient and ample to promptly and daily dispose of all material so to be removed and collected by said contractor in the garbage districts of the city of New Orleans as aforesaid. The vehicles or carts above referred to shall each be provided with a gong of sufficient size to be plainly heard by the occupant or occupants of the premises, and said gong shall be rung on the approach of such vehicle or cart, as notice to the occupants of the approach thereof.

"SEC. 7. *Be it further ordained, etc.,* That it shall also be the duty of the contractor to remove from within the said garbage districts all street pilings, collected by the public works department from gutters; ashes, house and ordinary street sweepings, but he shall not be required to remove debris from buildings in course of demolition, repair or construction, or any other refuse except that enumerated in this ordinance.

"SEC. 8. *Be it further ordained, etc.,* That the contractor shall, by proper notice in writing, issued to the occupants of premises in the several garbage districts named, inform the occupant or occupants of such premises of the hours when said ashes and house sweepings will be collected and removed, and it shall be the duty of such occupant or occupants to have such house sweepings and ashes placed in a box or barrel at some convenient point for the contractor and ready for removal at the hour designated by him, under a penalty for each omission of not more than ten dollars' fine or imprisonment for not more than ten days.

"SEC. 9. *Be it further ordained, etc.,* That the Commissioner of Public Works shall notify the contractor, in writing, of all street sweepings and pilings which are ready for removal, and it shall be the duty of the contractor, within twelve hours after such notice (unless prevented by bad weather) to remove all such sweepings and pilings so designated, under forfeit of ten dollars for every twelve hours he fails to remove said designated pilings, said forfeit to be deducted monthly from the amount due the contractor, in the manner herein provided for similar deductions as to garbage in Sec. 13 of this ordinance.

"SEC. 10. *Be it further ordained, etc.,* That the said works and plant shall, at all times, be subject to the inspection and supervision of the Board of Health of the State of Louisiana, and said board shall have supervision of the means and men employed in the collection, removal and disposition of said garbage, and if at any time the said collection and removal shall be improperly done or not conducted in a sanitary manner, through fault of said employees, said employees shall, on demand of said Board of Health, be discharged by said contractor and reliable and competent men put in their places,

"SEC. 11. *Be it further ordained, etc.,* That the said contractor shall collect all dead animals daily and all slops, garbage, offal and animal and vegetable matter in the city of New Orleans daily, from all private premises, public grounds, market places, restaurants, hospitals, slaughterhouses and all other places where animals, fowls or game are killed within the aforementioned garbage district.

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"SEC. 12. *Be it further ordained, etc.*, That the said contractor shall hold the city of New Orleans harmless and free from all loss, cost or damage that the said city may incur on account of the collection of said slops, offal, garbage, dead animals and animal and vegetable matter, and the transportation and disposal of the same as above set forth.

"SEC. 13. *Be it further ordained, etc.*, Should any complaint of non-collection or removal of garbage be made to the Commissioner of Public Works, which, upon investigation, shows that garbage, etc., has not been removed within the proper time, the said contractor shall upon notice by said Commissioner of Public Works, immediately send a special wagon to remove and collect the same, and on contractor's failure to collect and remove the said garbage within twelve hours after said notice, the said contractor shall forfeit the sum of ten dollars for each and every twelve hours that he fails to remove said garbage, and such penalties shall be held and deducted monthly from the amount earned under this contract by certificates issued to the Comptroller by said Commissioner of Public Works. In case said contractor is aggrieved by said deductions of said Commissioner of Public Works, he may appeal to the Council for relief, but the decision by the Council in said matter shall be conclusive and binding upon the contractor.

"SEC. 14. *Be it further ordained, etc.*, That when the contractor is ready to begin operations under this ordinance he shall notify the Mayor thereof, and the Mayor shall thereupon issue his proclamation to that effect, notifying the people of the city of New Orleans to comply with the terms of this ordinance, and it shall thereupon become the immediate duty of the occupant or occupants of every dwelling house or other building in the city of New Orleans to provide a suitable metallic, water-tight covered box or other covered metallic vessel, in which said occupant or occupants shall cause to be placed daily all offal, garbage, slops and refuse animal and vegetable matter from the premises, and shall place such metallic, water-tight covered box or other metallic covered vessel in such place as will be most convenient for said contractor to remove same, and any failure to comply with the provisions of said proclamation shall subject said occupant or occupants to fine of not more than ten dollars or imprisonment for not less than ten days for each and every day they shall fail to provide such box or vessel or comply with the provision of this section.

SEC. 15. *Be it further ordained, etc.*, That after the proclamation of the Mayor, as aforesaid, it shall be unlawful for any other person than the said contractor to collect, remove or dispose of from any public or private place any garbage, dead animals or other matter provided for in this ordinance and any person violating this clause of this ordinance shall be fined not less than five nor more than twenty-five dollars for each offence, or shall be imprisoned for not more than thirty days.

"SEC. 16. *Be it further ordained, etc.*, That within ten days from the adjudication of said contract by the City Council, the contractor must be ready to sign and enter into notarial contract before the city notary and provide and give to the city of New Orleans a bond in the penal sum of fifty thousand (\$50,000) dollars good and solvent

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security, to be approved by the Mayor, contingent for the faithful performance of each and every new covenant and condition of said agreement, and any failure on the part of the contractor to sign said contract and give said bond will forfeit to the city the twenty-five thousand (\$25,000) dollars deposited with the City Treasurer at the time of his bid.

"SEC. 17. *Be it further ordained, etc.*, That the contractor shall be ready in all respects to enter upon the discharge of his duties under this contract within one year from the date of the signing of said notarial act, and any failure on his part to be ready, at the expiration of said year, shall subject him to a fine of one hundred dollars per day for each and every day after the expiration of said year that he fails to begin work under this contract.

"SEC. 18. *Be it further ordained, etc.*, That the price which the city of New Orleans is to pay the said contractor for the services to be performed under said contract shall be divided into sixty equal parts for the first five years, and the same ratio shall be the basis for all payments to said contractor for each succeeding five years during the existence of this contract, so that payments shall be made monthly on the one-twelfth principle. Payments shall be made to the said contractor by warrant of the Comptroller on the Treasurer of the city of New Orleans, and the city of New Orleans hereby binds and obligates itself to appropriate every year during the existence of this contract, in the annual budget of receipts and expenditures, the sum agreed to be paid said contractor each year.

"SEC. 19. *Be it further ordained, etc.*, That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed.

"Adopted by the council of the city of New Orleans August 1, 1892.

"DAN. A. ROSE, *Clerk of Council.*

"Approved August 3, 1893:

"JOHN FITZPATRICK, *Mayor.*

"A true copy: CLARK STEEN, *Secretary to the Mayor.*"

The following is an extract from the brief of the City Attorney, disclosing the amounts the city contracted for and agreed to pay to the relator for the removal of garbage, in the contract which was drawn up and signed on the 12th of September, 1893, namely:

"Under Ordinance No. 7880, C. S., advertisement for sealed proposals was made, and by Ordinance No. 7992, C. S., the bid of E. G. Schlieder was, on the 29th of August, 1893, accepted by the council, and the Mayor directed and authorized to enter into notarial contract with Schlieder, by the terms of which the Mayor was to bind the city of New Orleans to pay to Schlieder for the collection, removal and disposal of garbage, the following amounts:

"For the first five years, one hundred and twenty thousand dollars per year.

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"For the second five years, one hundred and thirty-four thousand dollars per year.

"For the third five years, one hundred and fifty thousand dollars per year.

"For the fourth five years, one hundred and sixty-five thousand dollars per year" (brief, p. 4).

As this contract and ordinance have been several times under judicial investigation by this court, it will not be inappropriate to make mention of some of these adjudications in connection therewith and produce some of the court's expressions in reference thereto, especially in view of the charge of the city that the ordinance and contract thereunder are and were *ultra vires* and void *ab initio*.

For instance, in *State vs. Payssan*, 46 An. 1029, the court speaking through MR. JUSTICE BREAU, said:

"With reference to the unreasonableness" (of the city ordinance relative to the removal of garbage) "and the apprehension charged, we deem it in place, preliminarily, to state that the Legislature delegated the authority to the municipality to adopt needful regulations for the protection of health, and to maintain cleanliness.

"It is true the word 'garbage' is not used in the charter, but the equivalent is therein expressed. The council is authorized to adopt ordinances for the frequent inspection of buildings and premises, and to compel cleanliness. This necessarily includes the authority to have moved away and destroyed garbage that is annoying to health. The general power regarding health and cleanliness having been given, we are of opinion that the ordinance can not be impeached as invalid on the ground of unreasonableness."

Again:

"On this appeal we can only decide that garbage which may cause discomfort, which is injurious to health, can be removed and destroyed under an ordinance adopted under a legislative grant of power, and that this ordinance may be adopted without creating a monopoly or divesting vested rights."

Again:

"We do not perceive that there is reason to complain of an ordinance authorizing the removal of garbage by contract. The city government has the power of deciding in what manner a nuisance shall be removed. In having the work done by a contractor employed in the manner required by law, they have not exceeded the discretion with which they are vested in such matters."

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That was a prosecution which was inaugurated and carried on by the city in the affirmance of the ordinance and contract under consideration herein; and wherein the defendant resisted conviction and punishment on the grounds of the unreasonableness and illegality thereof. And in the opinion of this court, same were open to the objection neither of unreasonableness nor illegality.

In *State vs. Morris*, 47 An. 1860, this court, speaking through MR. JUSTICE BREAUX, recognized and announced similar principles as sustaining this ordinance and contract.

In *Southern Chemical and Fertilizing Company vs. Board of Assessors*, 48 An. 1475, this court, speaking through MR. JUSTICE MILLER said:

"The plaintiff is a corporation organized to execute a contract with the city of New Orleans to remove and dispose of the garbage and pilings of the city, and to manufacture chemicals, oils, soaps, candles, and similar articles, and for these purposes to erect and maintain mills and the necessary plant.

"It is in proof that plaintiff has purchased property, erected buildings and provided the machinery for the manufacturing purposes stated. * * *

"The act of incorporation declares the objects of the company to be, the execution of the contract with the city, for collecting and disposing of garbage, street pilings and refuse; and to manufacture chemicals, soaps, candles and similar articles, and for such purposes to erect and maintain mills and a plant and manufacturing establishments.

"The ordinance of the council, under which the contract was awarded to plaintiff, is to remove and dispose of garbage. This function in aid of the cleanliness of the city is distinct from the manufacturing business announced in plaintiff's charter."

This decision distinctly recognizes the legality of the relator's charter, its existence as a going concern in the full exercise of its franchise and the large investment it has made in pursuance of the ordinance of, and its contract with the city; and that the company is a manufacturer of fertilizers from garbage in the sense of the constitutional article entitling it to have its large and valuable plant exempted from *ad valorem* taxation.

In *Fertilizing Company, Limited, vs. Wolf & Sons*, 48 An. 641, this court, speaking through CHIEF JUSTICE NICHOLLS said:

"Plaintiffs' occupation and business rest, as we have said, upon a

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conventional contract which fixes its continuance for twenty years. They have vested rights in the matter of which they can not be divested by either the whim, the caprice or the dissatisfaction of the council. A rescission of their contract could only be brought about through proceedings in which would be subjected to judicial scrutiny and determination by judicial tests, the respective rights and obligations of the parties."

That decision fixes, and forever establishes the legal *status* of the fertilizing company under the city ordinance and its contract with the city; and further that it, thereunder, possesses vested rights which can not be divested or taken away from it, by either the whim, the caprice, or dissatisfaction of the council.

In other words, that its legal *status* can not be changed or disturbed otherwise than by legal proceedings, scrutiny and judgment.

A fair interpretation of these different expressions of this court in reference to this particular contract and ordinance forever silences the voice of the city as to the claim that her ordinance and contract were *ultra vires* and void; and with respect to her right to terminate her contract relations with the company, by the passage and promulgation of an *ex parte* ordinance declaring its plant and method of removing garbage a nuisance.

Nor can such an ordinance, passed with full knowledge of these decisions, give color or right to the city's attempt to displace and arbitrarily dispossess the relator, and undertake the collection and removal of garbage through the instrumentality of its own department of public works. Assuredly, *Market Company vs. City*, 47 An. 208, is not authority for that proposition.

Just here it is well to attract attention to the fact that the garbage ordinance and contract only embraced the populous and thickly inhabited portions of the city, and does not include the remote and outlying districts thereof, which continued to remain under the police superintendence and control of the City Council; and that within the district embraced by the ordinance and contract the proof discloses, and the fact is, that the relator is now, and at all times has been—with occasional exceptions, of course—engaged in collecting, removing and disposing of garbage according to contract; and proposes to continue to do, notwithstanding the city is likewise so engaged.

Nevertheless the City Council caused to be prepared and advertised an annual budget of expenses for the year 1897, at an early

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date in December, 1896, as it was in duty bound to do under the city charter, and the following extracts are made therefrom, viz.:

BUDGET OF EXPENDITURES FOR 1897.

Contracts—		
Jefferson City Gas Light Company	\$30,105 00	
Louisiana Electric Light Company	180,000 00	
New Orleans Waterworks and Electric Company, Ordinance No. 909, C. S., act Jos. D. Taylor, October 8, 1894, 1680 hydrants at \$60 each, \$100,800, less 6 per cent. deduction for cash payments to be deducted from last payment, eleven months, at \$9400		
	\$92,400 00	
One month at \$2352	2,352 00	94,752 00
Algiers Waterworks Company, Ordinance No. 11,262, C. S., act Jos. D. Taylor, November 20, 1895, 200 hydrants at \$60, \$12,000, subject to same deductions as above. Eleven months at \$1000		
	11,000 00	
One month at \$280	280 00	11,280 00
Ordinance No. 12,693, C. S., Geo. D. Barnard & Co.—		
400 polling booths at \$6.75	2,700 00	
1200 annex booths at \$5.75	6,900 00	9,600 00
Ordinance No. 12,712, C. S., E. F. Keplinger & Co.—		
475 ballot boxes at \$1.35		641 25
Rents City Recorders' Courts		1,000 00
Rents engine houses and police stations		1,800 00
Public sinks		1,500 00
Meals to jurors		2,500 00
Insurance on city property		4,000 00
Great Southern Telephone and Telegraph Company		8,000 00
	\$340,178 25	
Removal of garbage, 1896	40,000 00	
	\$380,178 25	
Harbor police		30,000 00
Wharves and landings		10,000 00
Commissioner of Public Works—		
Commissioner's salary		8,500 00
One chief clerk	\$1,800 00	
One book-keeper	1,500 00	
One assistant book-keeper	1,200 00	
One stenographer	600 00	
One porter and messenger	430 00	5,580 00
One general superintendent at \$150	1,800 00	
One general superintendent at upper district	1,200 00	
One general superintendent at lower district	1,200 00	
Seven district superintendents at \$75	6,300 00	10,500 00
Commissioners of Gentilly road		1,440 00
Algiers roadkeeper		720 00
One depot keeper	\$720 00	
Two depot keepers at \$50	1,200 00	1,920 00
Bridge keepers—		
Nineteen bridge keepers at \$50		11,400 00
Draining machines—Blenville draining machine—		
One engineer	\$1,000	
Two firemen	1,440	\$2,440 00
Dublin avenue draining machine—		
One engineer	1,000	
Two firemen	1,440	2,440 00
Melpomene draining machine—		
One engineer	1,000	
Two firemen	1,440	2,440 00
London avenue draining machine—		
One engineer	1,000	
Two firemen	1,440	2,440 00
Orleans pump—		
One engineer	1,000	
Two firemen	1,440	2,440 00
Algiers	120 00	12,820 00
Street labor—		
150 men at \$1.50 per day, for twenty-two days a month		59,400 00
Bridge gang and pavers		8,531 75
Lumber		5,000 00
Removing garbage, 1897		120,000 00
Coal		10,000 00
Total		\$250,311 75

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From the foregoing it appears there is listed in the budget, among expenditures to be made in 1897, "removal of garbage, 1896, forty thousand dollars;" and also an additional sum for the Commissioner of Public Works, "removing garbage, 1897, one hundred and twenty thousand dollars;" that is to say the total proposed expenditures being one hundred and sixty thousand dollars for the removal of garbage.

But there is nothing that is applicable in terms to the claims of the relator, and it is to this state of things that the relator's *mandamus* and injunction are directed and seek to have amended.

The writ of *mandamus* was applied for and the preliminary order granted soon after the advertisement appeared, and soon afterward the two Ordinances Nos. 12,936 and 12,937, making appropriations in pursuance of the budget, were adopted *pendente lite*, and they provoked the relator's injunction.

The provisions of the ordinance and the corresponding provisions of the garbage contract, upon which the relator chiefly relies, as imposing upon the City Council the specific duty it seeks to compel compliance with; by means of the writ of *mandamus*, are the following, namely:

"That the price which the city of New Orleans is to pay the said contractor for the services to be performed under said contract shall be divided into sixty equal parts for the first five years, and the same ratio shall be the basis of all payments to said contractor for each succeeding five years during the existence of the contract, so that payments shall be made monthly on the one-twelfth principle.

"Payments shall be made to the said contractor by warrant of the Comptroller on the Treasurer of the city of New Orleans; and the city of New Orleans *hereby binds and obligates itself to appropriate every year during the existence of this contract, in the annual budget of receipts and expenditures, the sum agreed to be paid said contractor each year.*"

Section 18 of Ordinance No. 7860, C. S.

And it further provides:

"That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed.

"Adopted by the council of the city of New Orleans, August 1, 1893." *Id.*, Sec. 19.

The provision of the charter of the city on the subject is as follows, viz.:

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"That the council shall once in twelve months, before fixing and deciding upon the amount of taxes and licenses to be assessed for the ensuing year, cause to be made out a detailed estimate exhibiting the various items of liability and expenditures, including the requisite amount for all expenses during said year; and shall cause same to be published for at least ten days in the official journal of the city, and such rate of taxation as provided by law shall thereafter be fixed and assessed as, together with other revenues of the city, may be necessary to meet said estimated liabilities and expenditures. The adoption of said detailed estimates shall be considered as the appropriation of the amount stated for the purposes therein stated," etc. Sec. 98 of Act 45 of 1896.

That section is an exact reproduction of Sec. 64 of Act 20 of 1882, the previous city charter, *ipseissimis verbis*.

From the terms of the foregoing ordinance, which is the foundation of relator's contract with the city, it appears that the method of making payments therein was specifically stipulated, and that the city bound and obligated herself "to appropriate every year during the existence of this contract, in the annual budget of receipts and expenditures, the sum agreed to be paid said contractor each year;" and from the provisions of the charter the necessary power is given to the City Council, and the corresponding duty is imposed upon them of making a budget of all expenses during each year, and to make the necessary appropriation therefor.

This contract does not contravene that provision of our statute which declares that "the police juries of the several parishes and the constituted authorities of incorporated towns and cities in this State shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted." Rev. Stat. 2448.

In *New Orleans Gas Light Company vs. City of New Orleans*, 42 An. 188, this court had under consideration and decided a similar question, the object of that suit being to annul a contract between the city and the Louisiana Electric Light and Power Company on that identical ground.

And in that case this court said:

"The obligation of the city for future disbursements in favor of the company is conditioned on the performance on the part of the

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latter of its part of the contract, a fact to be ascertained under the terms of the contract itself, from month to month. Although the eventual disbursements to be made by the city may amount to several hundred thousand dollars it is certainly not correct to argue that the effect of the contract was to place it in debt to that amount."

And in *Snelling vs. Police Jury*, 42 An. 886, this court affirmed a contract made by the defendant for the construction of a bridge, and for which they gave ten negotiable promissory notes; and in so deciding we held that police juries have the authority to contract for parochial improvements "to be paid out of taxes which they are authorized to levy and which are to be set apart for this special purpose."

And in *Louisiana & Northwest Railroad Company vs. Police Jury*, 48 An. 881, this court maintained as legal and valid, a police jury ordinance providing for the erection of a court house and accepting a bid from the contractors, the terms of which provided for payments in annual instalments and the same were to be discharged from the *future revenues* of the parish within the ten mill limitation.

Those decisions are sustainable upon like principles announced in *Weston vs. City of Syracuse*, 17 N. Y. 110, and *Valparaiso vs. Gardner*, 7 Amer. and Eng. Corp. Cases, 626.

So the bonds of the city which are issued to the relator are not only not impeachable on the ground stated, but they are made payable out of the current annual revenues of the city, and the city obliged herself in the ordinance and contract to place in her annual budget an amount sufficient to meet each one of the twelve monthly instalments thereof as they became due.

What this court said on the same subject in *Gas Light Co. vs. City*, *vide supra* is strictly applicable to the instant case, viz.:

"As it appears from the stipulations hereinabove transcribed the city obligates itself to annually provide in its budget the means of discharging its pecuniary liability under the contract for each ensuing year.

"How else could the city have possibly provided for the means necessary to pay for its annual supply of gas, or of any other needed and indispensable commodity, but out of its annual revenues and by means of a budget framed in accordance with the positive mandate of the law.

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"We know of no other mode, and we have been referred to none."

As a matter of fact which appears on the budget, there is one hundred and twenty thousand dollars and forty thousand dollars, appropriated for the expense of garbage removal; and if relator has the right, by either *mandamas* or injunction, to coerce the city to keep to the specifications of her ordinance, the provisions of her contract, and those of her charter, there is enough of money appropriated to pay relator's demand and leave a surplus of forty thousand dollars in reserve for the city.

Not only is this true, but we find in the brief of the City Attorney the following distinct and emphatic statement, viz.:

"Since the adoption of Ordinance No. 12,537, the Department of Public Works has discharged the duty of collecting, removing and disposing of the garbage of the city of New Orleans, at an average monthly cost of seven thousand four hundred and thirty-one dollars." Brief, p. 7.

That ordinance was the one which declared relator's plant and its operation a nuisance, and it was adopted on the 30th of July, 1896; consequently, the purport of that admission is, that the city has only expended about seven thousand four hundred and fifty dollars per month, between that date and the date of the promulgation of the budget.

On that theory, the sum of about ninety thousand dollars should cover the amount of her expenditures for garbage removal during the year 1897, and leave a surplus of thirty thousand dollars applicable to the relator's contract independently of the forty thousand dollars, which is misappropriated to the deficit on garbage of 1896. These two items added, make a sum of seventy thousand dollars, which is in excess of the necessary expense of the city in the removal of garbage, *after she has been fully provided for.*

It is provided by statute "that the revenues of the several parishes and municipal corporations of this State, of each year, shall be devoted to the expenditures of that year; *provided*, that any surplus of said revenues may be applied to the payment of the indebtedness of former years." Sec. 3 of Act 39 of 1877.

That statute is particularly pointed out in the relator's petition for injunction, and applied to the two city ordinances, Nos. 12,936 and 12,937, approving the budget and making appropriations for the

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expenses therein enumerated; and the prayer of relator is that *no moneys shall be therein appropriated to the prejudice of its mandamus, and that revenues, to be raised by taxation under an appropriation for 1897, shall not be diverted to indebtedness which was incurred in 1896, to the prejudice of its demands for and during 1897, in plain disregard of the law.*

The law is plain, and its attempted violation is clear. The remedy is sought, and it can be readily and easily supplied. Why should it not be done?

Not only does the budget call for the forty thousand dollars that is particularly specified for deficit of garbage expense for 1896, but it carries also the sum of ten thousand two hundred and forty-one dollars and twenty-five cents as an allowance to cover the expenses of an election in 1896. If this sum be applied to the relator's claim, the amount applicable thereto would be increased to more than eighty thousand dollars, not disturbing the amount to which the city is entitled to according to the statement of the city attorney.

Having made this elaborate statement of the relative position of the parties, and the facts and circumstances of this litigation, they must be tested by the law and jurisprudence in order to determine whether *mandamus* is the remedy for the enforcement of the relator's rights against the municipality.

After a very careful examination of all the authorities at hand, we have made the following analysis of them, viz.:

Mr. High, in treating "of *mandamus* to municipal corporations," says:

"*Mandamus* has been fitly termed the spur by which municipal officers are moved to the performance of their duty. And it may be affirmed as a general rule, sanctioned by the best authorities, that when a plain and imperative duty is specifically imposed by law upon the officers of a municipal corporation, so that in its performance they act merely in a ministerial capacity, without being called upon to exercise their own judgment as to whether the duty shall or shall not be performed, *mandamus* is the only adequate remedy to set them in motion, and the writ is freely granted in such cases, the ordinary remedies at law being unavailing. As illustrating the rule, it is held, that where county commissioners are required by a plain and positive statute to set aside a certain portion of the county funds annually for a specific purpose, and have refused to perform

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this duty, they may be compelled to act by *mandamus*." Citing Humboldt Co. vs. Churchill Co., 6 Nev. 30; Hall vs. Selectmen of Somersworth, 39 N. H. 511; *Ex parte* Common Council of Albany, 3 Cowan, 358; People vs. Common Council of New York, 45 Barb. 473; People vs. Collins, 7 Johns Rep. 549.

Again:

"So, when, under the statutes of the State it is made the imperative duty of town authorities to appropriate and pay over a certain percentage of the taxation of the town for the support of teachers' institutes, the payment may be enforced by *mandamus*, there being no other adequate remedy, by action at law or otherwise.

"And where a board of municipal officers are required by law to raise for the support of the poor, so much money annually as may be fixed by another board, entrusted with the full power of determining the amount thus raised, the duty of raising the money may be enforced by *mandamus*, there being no discretion left to the officers, and their duty being of a ministerial nature." High on Extraordinary Legal Remedies, Sec. 324.

That author further says, in treating of *mandamus* as a means of compelling "the auditing and payment of claims against municipal corporations," the question, preliminarily, is "whether any other legal and specific remedy exists, by an action at law, or otherwise, adequate to afford relief to the party aggrieved. And the rule is too firmly established to admit of doubt, or controversy, that, if there be *any other adequate and specific remedy*, such as an action at law against the corporation, by which relief may be had by the aggrieved claimant, *mandamus* will not lie to compel municipal authorities or their auditing boards or officers, either to audit or pay claims against the corporation." *Id.*, Secs. 338 and 339.

But the author supplements that statement of the law by the following, viz.:

"Where certain services are authorized by statute, and made a charge against a county, *mandamus* will lie to its board of supervisors, requiring them to receive and allow a claim against the county for the services thus rendered. Thus, when it is provided by statute that medical services rendered for the indigent sick of a county shall be made a charge upon the county, the duty imposed upon the supervisors of allowing a claim for such services is treated as an official duty, peremptory in its nature, which they are not at

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liberty to disregard, and in the discharge of which they can not be permitted to follow their own caprices. *Mandamus* will therefore lie in such case to compel the performance of the duty." *Id.*, Sec. 350; *People vs. Supervisors of Macomb County*, 3 Mich. 475.

Another author says:

"A writ of *mandamus* will be granted against municipal corporations and their officers whenever they refuse or unreasonably neglect to perform any duty clearly enjoined upon them by charter, or statute or law, and there is no other specific legal remedy adequate to enforce the right of the public, or the specific legal right of the relator." Citing *Hall vs. Selectmen*, 30 N. H. 511; *Hawkins vs. County Commissioners*, 8 Conn. 243; *Commonwealth vs. Allegheny Co.*, 32 Penn. St. 218; *State vs. Kirkley*, 29 Md. 85; *Angel & Ames*, Sec. 709; *People vs. Supervisors*, 10 Wendell, 363; *State vs. Cincinnati*, 19 Ohio, 178; *State vs. Wood County*, 17 Ohio, St. 184; *Hall vs. Lappins*, 3 Oregon, 55; *Sidberry vs. Commissioners*, 66 N. C. 486.

He quotes with approval the following passage by Judge Story, viz.:

"Whenever there is a clear legal right in the relator, a corresponding duty on the defendants and the want of other adequate and specific remedy a writ of *mandamus* is an appropriate process." 2 Dill n's Munic. Corp., Sec. 665; *Commonwealth vs. Pittsburg*, 34 Penn. St. 496.

The author further says:

"The well established general rule is, as above stated, that the writ of *mandamus* will only lie to give effect to a clear legal right, but if there be a reasonable doubt respecting the right of the public or of the relator to this form of remedy the writ will be granted and the question of the right considered on the return.

"And however clear the legal right of the relator or applicant for the writ may be, the writ can not be sustained if there is a clear, ample and adequate remedy by an ordinary action at law. But since the proceeding by *mandamus* has been assimilated to ordinary proceedings, the relator, if otherwise entitled, should not be denied a resort to this remedy on the ground that he can sue at law, unless it appears that this latter remedy is just as adequate and effectual as the other." *Id.*, Sec. 667.

Now, it must be borne in mind, that under our Code of Practice *mandamus* is regarded as an ordinary action coupled with a demand

for a *special mode of relief*. This suit was filed in the Civil District Court and tried and decided there, and same was brought up to this court by appeal, and it must not be confounded with the writ of *mandamus* which this court exercises under its supervisory jurisdiction, which is *exclusively original*.

But that author is not only very full and concise in his treatment of the general rule with regard to the right to employ *mandamus* in dealing with a municipal corporation as a well recognized and established remedy, but he is equally as clear and just as emphatic in his treatment of the right to its employment "to enforce duties toward creditors" of a municipal corporation.

On this subject he says:

"*Mandamus* is one of the principal remedies by which municipal and public corporations are compelled to perform their duties toward their creditors. The power of the Legislature over these corporations is such that it may require them to levy a tax to pay creditors, and obedience to such requirement may be enforced by *mandamus*. The power of municipal corporations to make contracts and to create liabilities has been considered; and this authority imposes the duty of providing for the payment of obligations and liabilities in the special mode prescribed by law, and, if no such mode is prescribed, then by the levy and collection of taxes under the provisions of the charter or legislative act. Whether the duty to provide for the payment of the liabilities of the corporation can be specially enjoined, or whether it results from the general powers and nature of the corporation, it may, in all proper cases, be equally enforced by *mandamus*." *Id.*, Sec. 685. (Our italics.) Citing *Wakely vs. Muscatine*, 6 Wallace, 481; *Mayor vs. Lord*, 9 Wallace, 409; *Commonwealth vs. Allegheny*, 82 Penn. St. 400; *Maddox vs. Graham*, 2 Metcalf (Ky.) 56; *Lexington vs. Mulikin*, 7 Gray (Mass.) 280; *State vs. Milwaukee*, 8 Wallace, 575; *Galena vs. Amy*, 5 Wallace, 705; *Pigrom vs. County*, 64 N. C. 557; *Soutter vs. Madison*, 15 Wis. 30; *Flagg vs. Palmyra*, 33 Mo. 440; *Columbia Co. vs. King*, 13 Fla. 451; *Brown vs. Gugo*, 32 Iowa, 496; *State vs. Milwaukee*, 25 Wisconsin, 122.

That this is the well established rule of interpretation in common-law States there can be no question, and it is bottomed upon the jurisprudence of the Supreme Court of the United States.

But with us the remedy by *mandamus* is statutory, and it is either an independent or an auxiliary one, as the case may be.

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Our Code provides that "the object of this order is to prevent a denial of justice, * * * and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever." C. P. 830.

In *Hatch vs. City*, 1 R. 470, it was held that "under the Code of Practice the power of the courts of this State as to issuing writs of *mandamus* are more extensive than those of tribunals governed by the common law."

And this precept was adhered to and adopted in *State ex rel. Barbin vs. Secretary of State*, 32 An. 579.

And in *State ex rel. Canal Company vs. City*, 35 An. 68, this court affirmed what was said in *Barbin vs. Secretary*, and said: "We had occasion therein to show, upon the authority of previous decisions of this court, that the writ of *mandamus*, as provided by our Code, was broader in its scope and intendment than under the common law, and was not to be authoritatively construed by the adjudications under that system."

In *City of Galena vs. Amy*, 5 Wallace, 705, the court held that when the charter of a municipal corporation is authorized to levy a tax, *mandamus* was a proper remedy to enforce it. In the *Board of Commissioners of Knox County vs. Aspinwall*, 24 Howard, 376, it was held when the fund to pay the debt, "by the face of the contract, is a special tax laid and to be collected by the defendants, (and) they refuse to perform a plain duty, there is no other writ which can afford the party a remedy which the court is bound to afford, except that afforded by the writ of *mandamus*."

This class of cases has been frequently before this court and its course of treatment of it has been uniform and consistent.

For instance, in *State ex rel. Carondelet Canal, etc., vs. Mayor and Administrators*, 30 An. 129, the relator sought by *mandamus* to compel the respondents to make provision in the annual budget for the payment of a judgment, and the court said:

"By Sec. 124 of the act approved March 20, 1856, it was the duty of the government to provide in the annual budget, for all matured debts and obligations of the city; and the adoption of the budget was to be considered the appropriation of the amount for the purposes therein stated. This section of the act of 1856 is specially referred to and recognized in the second section of Act 5 of 1870 as being still in force.

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"It was, therefore, the plain duty of the Mayor and administrators to have provided in the next annual budget * * * for the payment of the judgment, etc. * * *

"This plain duty they had failed to perform.

* * * * *

"But the duty still remained of providing for the payment in the *only* mode by which judgment creditors of the city are permitted to collect their judgments. This required the action of the Mayor and administrators, in their aggregate capacity as a municipal government; the adoption of the annual budget; the levy of the necessary taxes, and the setting apart of a sufficient amount to pay this and all other registered judgments.

"Perfect as the right of relator is to have provision thus made for the payment of its judgment, there is no reason or process by which it can be enforced otherwise than by *mandamus*. The duty of the city to make this provision is not discretionary either as to time or the manner. The law imperatively requires that it shall be in the *next* annual budget, and by setting apart, appropriating a sufficient amount out of the annual revenues. The duty of the Mayor and administrators is plain and the right of the relator is absolute.

This is the same identical remedy that the relator in the instant case is seeking. The same provision of law that was relied upon in that case is found in the city charters of 1882 and of 1896, and is invoked herein.

Instead of a judgment for a matter of ordinary indebtedness of the city, the relator has bonds of the city evidenced by an ordinance of the city enacted in pursuance of her charter and the general laws of the State in reference to the removal of garbage, in which she specifically bound herself to place the amounts annually due, in her budget and make an appropriation therefor—thus presenting the plain ministerial duty of the city in its strongest possible light.

This case was followed and affirmed in the following cases viz.:

State *ex rel.* Carondelet Canal Co. vs. Mayor, 30 An. 705; State *ex rel.* Marchand vs. City, 37 An. 13.

But in State *ex rel.* De Leon vs. City of New Orleans, 34 An. 477, there was presented and decided the identical question we have now under consideration.

The court in the opening sentence, speaking through MR. JUSTICE FENNER, said:

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"This is a *mandamus* proceeding by the relator, as holder of the bonds of the city of New Orleans, issued under Act 49 of 1869, to compel the city administrators to comply with the provisions of section three thereof, by providing for the payment of the interest coupons falling due in 1882, and in subsequent years."

In speaking of the terms in which the judgment appealed from was couched, the court said:

"The judgment appealed from commands the respondents to include in the estimates of receipts and expenditures to be adopted by them for 1882 * * * appropriations sufficient to meet and pay the interest upon the bonds held by the relator," etc.

And in speaking of relator's remedy by *mandamus*, said:

"The city contends, however, that this remedy, as far as it and its officers are concerned, has been taken away by subsequent legislation, to-wit: by Act 5 of 1870.

"The performance of the duties referred to is certainly a vital obligation of relator's contract.

"The only remedy afforded by the law to enforce performance of this obligation was the writ of *mandamus*, and if that remedy has been taken away, it is evident that there exists to-day, in the remedial system of our law, no remedy whatever for the enforcement of this specific obligation of the contract."

But the court entertained a contrary opinion, and affirmed the judgment making the *mandamus* peremptory.

The same principle was announced and applied in *State ex rel. Bauman vs. Judge*, 38 An. 43.

In *State ex rel. Barber Asphalt Company vs. City*, 40 An. 299, this court said:

"The brief for rehearing entirely misconstrues our original opinion in assuming that we held that Act 5 of 1870 operates as a bar to a judicial enforcement by *mandamus* * * * of the performance of specific duties imposed by subsequent legislation upon the city of New Orleans, its Common Council, or any of its officers. The contrary has been too frequently affirmed by this court to be longer a subject of controversy." Citing numerous cases.

The same principle was announced in *State ex rel. Fernandez vs. City*, 45 An. 1389.

It has been frequently held by the Supreme Court that a municipal ordinance levying a tax was a *law of the State* in the sense of the

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constitutional provision relative to the impairment of the obligation of contracts; and in *New Orleans Waterworks Company vs. Louisiana Sugar Refinery Company*, 125 U. S. 18, they said: "A by-law, or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the State *having all the force of law* within the limits of the municipality that it may be properly considered as law," etc. *Merriweather vs. Grant*, 102 U. S. 472; *Home Insurance Company vs. City*, 93 U. S. 116.

In *Murray vs. Charleston*, 96 U. S. 432, the court stated emphatically, that "when city ordinances are passed under the supposed authority of a legislative act *their provisions become the law of the State.*"

The garbage ordinance was authorized by various acts of the Legislature appertaining to that subject, viz.: Act 14 of 1877, Extra Session; Act 40 of 1882, and Act 94 of 1888.

The proposition on the part of the city made in that ordinance to dispose of the garbage franchise at public auction was a legal and proper one, and her charter imposed the duty upon her to see to it that garbage was removed from her streets as a sanitary regulation. This duty was likewise imposed in the Constitution and the general law with reference to the exercise of the police power. In that ordinance she bound herself to provide in the annual budget for the monthly instalments of the price she agreed to pay the garbage company, and her charter in mandatory terms required her to prepare an annual budget of all expenses and disbursements.

The case of the relator is a strong one and the plain ministerial duty of the City Council is clear.

But notwithstanding this concurrence and weight of adjudication in favor of the exercise of the writ of *mandamus* for the purpose of compelling municipal corporations to perform their plain ministerial duties to their creditors in making provisions for their payment, yet the contention of the City Attorney is that it can not be resorted to for the purpose of enforcing a contractual duty—that is to say, the specific performance of a contract.

But it is error to say that this is a proceeding for the enforcement of a contract. Such is not the case which is presented by the petition or the return. On the contrary, it is most distinctly a proceeding exclusively directed against the city's annual budget of expenses

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and appropriations for the year 1897, and the only claim made by the relator is that the City Council has failed to perform a plain ministerial duty which is set forth in the eighteenth section of the garbage ordinance to the effect that "the city of New Orleans hereby binds and obligates itself to appropriate every year during the existence of this contract in the annual budget of receipts and expenditures the sum agreed to be paid said contractor each year."

And which duty is further imposed and emphasized by the provisions of the city charter in the following specific terms, viz.:

"That the council *shall* once in twelve months, before fixing and deciding upon the amount of taxes and license for the ensuing year, cause to be made out a detailed estimate, exhibiting the various items of liability and expenditures, including the requisite amount for all expenses during the year," etc.—the adoption of which shall be considered an appropriation of the amount stated for the purposes therein stated. Sec. 93 of Act 45 of 1896.

The only relief demanded by the writ of *mandamus* is that the City Council shall place relator's claim upon the budget of expenses for the sum of one hundred and twenty thousand dollars, to cover the company's expense in the removal of garbage for the current year, and include same in the appropriation therefor; and the only relief by injunction is, to preserve the *status quo* pending the *mandamus* proceedings, so that the ordinances approving the budget and appropriation after the preliminary writ of *mandamus* had been granted, should not become final and irrevocable, and the revenues thereunder arising be disbursed, and relator's recourse thereupon defeated and destroyed.

Such a proceeding is altogether dissimilar from the specific performance of a contract to do or not to do; but it is one for the compulsory performance of a plain, ministerial duty.

It is just such a proceeding as that of State *ex rel.* De Leon vs. City, *supra*, and State *ex rel.* Carondelet Canal, etc., vs. Mayor, *supra*.

In such a case no question of the performance or non-performance of contract can be determined; and it was upon this specific ground that the judge *a quo* rejected all such evidence, and which rulings seem to have been acquiesced in. The city ordinance declaring relator's plant and its method of garbage removal to be a nuisance does not dispose of the legal right of relator in the premises, nor was it intended to have that effect; for we have the admission in the

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record and in the argument that it was made the foundation *only* of the subsequent action of the city in undertaking the removal of garbage through its department of public works, not as a basis of proceedings for the forfeiture of the contract of the city with the fertilizing company. It is quite impossible to conceive of the city's course of dealing with its contract creditors having the *legal* effect of absolving her from the performance of a plain, ministerial duty to them, or to place the relator in the position of suing for the specific performance of her contract—same *being perfect, intact and unassailed* and the company in full possession of the garbage district of the city.

Not only so, but the contract of the *city* is one for the payment of a certain, definite sum of money from the annual revenues of the year 1887, to be raised by taxation.

But, under the express provision of our Code, specific performance is an element of the contract to do, or not to do, for they declare, viz.:

“On the *breach* of an obligation to do or not to do, the *obligee* is entitled either to damages, or in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract,” etc. (Our italics.) R. C. C. 1926.

It is apparent from a casual inspection of that language that the demand for the specific performance of a contract to do or not to do must be preceded by a *breach* of it on the part of the *obligor*, and such breach entitles the *obligee* in the contract to sue the *obligor* for the specific performance of it, or for its annulment and the consequent damages.

It is manifest that this suit is not for the specific performance of a contract at all, (1) because it is not instituted by the *obligee* in the contract, which is made *the* essential requisite by the Code; (2) the engagement of the *city* is neither to do or not to do; (3) there is no breach of contract alleged, but a default of the obligee in carrying out its terms; and (4) it proceeds in the *affirmance* of the contract, seeking to obtain its avails, and keep same in force *in futuro*.

Relief by compelling specific performance is just the reverse of this proceeding in every essential particular.

Had the city, in pursuance of her nuisance ordinance, taken the initiative by instituting suit for the revocation of her contract with the fertilizer company, or to compel full compliance with its con-

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tract by removing garbage, she would have presented a case of specific performance under the Code, possibly. The contract of sale furnishes frequent illustrations of this principle; and to make the application let us take the case of *Citizens Bank vs. James*, 36 An. 267, wherein specific performance was demanded of an intending purchaser, and of which the court said:

"The bank asks that the defendant should be compelled to comply with the terms of his contract. It is not in our power to force him to do so"—that is, to *purchase* the property. "The penalty he incurs for violating it is the damage he has occasioned."

In the contract under consideration what did the city oblige herself to do? Nothing but to pay relator for the removal of garbage from the streets the price stipulated in her ordinance and contract. They contain *no other alternative obligation* of any kind.

The contract of the city was one to give. • R. O. C. 1899.

Having refused or failed to pay, what damages can be awarded against her? None except the interest which results from her default "in the performance of an obligation to pay money." R. O. C. 1935, 1936. But the situation is relieved of any difficulty by comparing the article last cited with a subsequent article which declares, viz.:

"Where the object of the contract is *anything but the payment of money*, the damages due to the creditor for its violation are the amount of the loss he has sustained and the profit of which he has been deprived of," etc. R. O. C. 1934.

But even applying to this case the principles of specific performance, they lack application, because the *respondent* is a *municipal corporation non sui juris*. It would be an altogether different situation confronting us if the *respondent* were a *private* corporation or a private individual, and the city were the relator, as in *State ex rel. The City of New Orleans vs. The New Orleans & Carrollton Railroad Company*, 37 An. 589, upon which the City Attorney relies. In that case the city, as *relator*, sought by a writ of *mandamus* to compel the respondent to proceed at once to *repair a certain street of the city*, and the obligation sought to be thus enforced was one of the stipulations in a contract of sale.

The writ was refused, and properly.

State ex rel. City of New Orleans vs. New Orleans & Northeastern Railroad Company, 42 An. 138, was a similar case. *State ex rel. McEnergy vs. Nicholls, Governor*, 42 An. 222, and *State ex rel. City*

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of New Orleans vs. New Orleans & Carrollton Railroad Company, 44 An. 1026, are of the same tenor and purport.

It is conspicuous that in each of those cases the city of New Orleans was *relator*; but in none of those cited was she respondent. And it is confidently believed that no such case can be found, in which the city was *respondent*. But there is still another principle of more controlling force in interpreting the relator's remedy against the municipality, and that is, that the agreement between the parties is not a *contract in the ordinary acceptation of the term*—the subject matter of this mutual agreement being the removal of garbage from the streets of the city, under municipal regulations in respect to the exercise of the police power of the city.

The city ordinance proposing and founding the engagement, primarily, rests upon the following legislative enactments, viz.:

Act 14 of 1877, Extra Session.

Act 40 of 1882.

Act 94 of 1883.

In Macon vs. Shawneetown, 77 Illinois, 585, the court said:

“The ordinance can not, we think, be treated as a *mere contract* between the city, as proprietor of the land on which the right of way is granted, and the railroad company, to which no one else is privy, and under which no third person can derive immediately any private right, prescribing conditions of the grant, to be enforced only by the city itself. Although it takes the form of a contract, provides for its acceptance and contemplates a written agreement in execution of it, it is also, and primarily a *municipal regulation*, and as such, being duly authorized by the legislative power of the State, has the force of law within the limits of the city.”

This extract from the opinion of the Illinois court was quoted with approval by the Supreme Court in Hays vs. Michigan Central Railroad Company, 111 U. S. 228.

For the enforcement of such a contract or engagement *against* the city, *mandamus* is the proper remedy. But if it be held that the relator has not that right, what other adequate and sufficient remedy is there remaining to the relator?

In Abascal vs. City of New Orleans, 48 An. 365, we held the holders of floating debt certificates were not entitled to recover absolute money judgments against the city.

To the same effect are the following cases, viz.: Johnson vs. City,

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46 An. 714; *Newgass vs. City*, 42 An. 169; *Paving Company vs. City*, 43 An. 464; *Bermudez vs. City*, 45 An. 1389; *Same vs. Same*, 46 An. 1180.

If the *mandamus* be refused the ordinances approving the budget as it now stands and making the appropriations of the revenues of the current year to the payment thereof, become absolute and irrevocable, and there will not remain a single farthing which will be applicable to the payment of relator's claims. And in case its claim for monthly allowances for the removal of garbage is denied it virtually becomes a floating indebtedness which can not be reduced to judgment, with no possible revenue to meet it, save and except any surplus there may be in any future year over and above the current expenditures. In *State ex rel. Fazende vs. City*, 35 An. 221, the court held that *mandamus* would not lie to compel the municipal authorities to place a sum on the budget *after* the appropriation had been made to the expenditures therein specified; and in *State ex rel. Samory vs. City*, 34 An. 460, the writ of *mandamus* to compel the city authorities to provide for and set apart a sufficient amount of the revenues to pay the interest on the relator's bonds was refused because the appropriations in the budget had exhausted the city's limit and power of taxation. This theory finds ample illustration in our opinion in *State ex rel. Foy vs. Mayor*, No. 12,405.

If this result be reached, it will, of course, be out of the question for the relator to continue the operation of its large and expensive plant, as it will be deprived of the revenues which the ordinance and garbage contract make applicable thereto. This result should not be brought about by the decree of this court unless it is made *absolutely necessary by the inexorable demands of the law*; particularly in view of the fact that the budget carries an allowance for garbage alone, which is seventy thousand dollars in excess of all the requirements of the department of public works, for the collection and removal of garbage for and during the entire year 1897.

And in view of the fact—one that is worthy of serious consideration—that the judge *a quo* rendered judgment in favor of the relator and made the *mandamus* peremptory, the relator's claim to relief is greatly strengthened; as a decree of the court below is entitled to consideration and weight, and particularly in cases when the determinative questions of law or fact are closely or nearly equally balanced.

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And that consideration and weight are increased and strengthened by the strong equities that are in favor of the relator's demand, as well as the fact that the city budget carries an appropriation largely in excess of the city's needs for the removal of garbage for the current year. To permit such an interpretation to be placed upon relator's right in the premises would be equivalent to the divestiture of its vested rights, which we said in the Wolf case could not be done at the whim, the caprice, or the dissatisfaction of the council.

The *mandamus* proceeding of the relator having been filed and the preliminary writ having been issued to and served upon the Mayor of the city immediately after the budget was published, it had the legal effect of staying matters in that condition until the right to a peremptory writ was judicially determined. The subsequent adoption of city ordinances approving and making the budget final had a like effect as the homologation of an administrator's account so far as not opposed; it did not affect the status of the claim of relator to have the budget allowance for garbage so adjusted, judicially, as to meet its requirements. In that respect the budget is open to investigation and restatement, just as an administrator's account which has been opposed.

Consequently there is no legal obstacle to the adjustment of the budget so as to make it conform to the relator's demands.

In conclusion, there is but one word to be said about the city's right to have relator's injunction dissolved on bond, and that is that by thus suspending the injunction, its effect would have been destroyed—the city being dispensed from giving bond in all cases.

The object of the *mandamus* is to compel the City Council to apply the amount of one hundred and twenty thousand dollars already appropriated in the budget for garbage removal to its demands, and that of the injunction is to restrain them from diverting or misapplying this fund when created to any other purpose—thus protecting the relator in its franchise and contract rights.

This case is easily distinguished from that of State *ex rel.* Florville Foy vs. Mayor and Council of New Orleans, No. 12,405, just decided, and the authorities cited therein. *Mandamus* was claimed in that case on the authority of Sec. 2 of Act 5 of 1870, Extra Session, to compel the respondents "to budget a sufficient amount" to pay and satisfy the relator's two judgments for money, which had been

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rendered against the city in previous years—the budget containing no provision of any kind for the payment of judgments.

The following is the city's return:

“Relator is the owner of two judgments against the city of New Orleans, on which there remains unpaid a balance of two thousand and fifty-five dollars and ninety-four cents.

“He applied to the lower court for a *mandamus* to compel the Mayor and Council to budget in the general budget for 1897 the amount necessary to pay his judgment. This application was made December 7, 1896, and the writ was made returnable on December 21, 1896. The budget was adopted on December 16, 1896. The return to the writ was filed on December 21, 1896, and stated for reason why the *mandamus* should be refused:

1. That relator's petition disclosed no cause of action.
2. That the budget for 1897 had already been adopted, and all the revenues for 1897 disposed of by the same, and that the appropriations made for specific purposes can not be diverted from those objects for any cause whatever, but remain sacred to the objects of the appropriation.
3. That the budget of 1897 exhausts all the revenues of that year, as named in said budget.
4. That it is the duty of the Council to estimate the receipts and expenses in preparing the annual budget, and after it has done so, in the exercise of its discretion, its action can not be reviewed in a *mandamus* proceeding.
5. That relator's demand is an ordinary money demand, and he is limited in his action against the funds and taxes and collections of the particular year during which the obligations which form the basis of his judgment were created.
6. That the city can not legally apply the taxes of 1897 for the payment of any other expenses than those of 1897.

And the respondent pleaded a general denial.

The provisions of the act on which the relator relied are to the effect, that the comptroller of the city was required to warrant upon the treasurer for the amount due upon any registered judgment without any special appropriation, if there was sufficient money in the treasury to pay same specially designated for that purpose in the annual budget; otherwise, the statute provided, “that the Common Council shall have power, if they deem proper, to appropriate from the

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*money set apart in the budget, or annual estimate for contingent expenses, a sufficient sum of money to pay said judgment; but if no such appropriation be made * * * then all judgments shall be paid in the order in which they shall be filed and registered * * * from the first money next annually set apart for that purpose."*

On the face of the statute, *the duty was purely discretionary*; and no claim was made by the relator that there is, in the budget for 1897, *any money in the contingent fund* that is applicable to his judgments.

The city can not be permitted to exclude the garbage company from the garbage fund that has been appropriated, and apply it to her own use in direct violation of her contract.

This controversy may be epitomized as one for the *control of an existing appropriation* in the annual budget for garbage removal during the current year 1897, the relator claiming under its contract, and the city claiming it for itself, disavowing its contract.

It is evident that both are not entitled to collect garbage; and hence, both are not entitled to be compensated for performing the service.

The right of no third person is involved; and the budget having been approved by the council since the preliminary writ of *mandamus* was served, it has become final and conclusive, in all other respects than that of the garbage appropriation.

No readjustment of the budget is contemplated in respect to any other claim which is carried on the budget. No *increase* of garbage allowance is demanded; and no increase in the total appropriation is demanded. If the *mandamus* is made peremptory, the city will be necessarily excluded from *use* of the garbage fund when realized by the department of public works; and if it be denied the garbage, company will be forced to discontinue its collection altogether.

If the city is kept to her contract it won't require the fund, and she has the correlative right to coerce relator's performance of duty under it.

Evidently the city has not the right summarily to displace a contractor in the manner proposed; and it is equally evident that it can be coerced to perform the plain ministerial duty of budgeting relator's claim as provided in the ordinance and as required by law.

It is manifest, from the face of the record, that the writ should be made peremptory (1) because garbage must be removed immediately

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in order that the health of the inhabitants of the city may not be endangered; (2) because the department of public works is dumping garbage on the vacant lots and squares of the city, to the detriment of the public health, and into the Mississippi river in front of the city, in contravention of a criminal law of the United States, and (3) because the relator has a sufficient force and the means of removing garbage in possession, and a plant in full operation, adequate for the purpose of *removing and disposing of* garbage without either dumping same on vacant squares or in the Mississippi river.

And observing the rule of law "that courts of justice will generally take notice of whatever ought to be generally known within the limits of their jurisdiction" (Gl. Ev., Sec. 6), we will take notice of the fact that such a disposition of the case will be in keeping with recent recommendations which the Secretary of War has made on upon the subject to the mayor of the city, since the submission of this case.

Entertaining these views, the *mandamus* should be made peremptory.

BLANCHARD, J., concurs in this dissent.

No. 12,334.

Mrs. P. A. COUDROY, WIDOW, ETC., vs. JOSEPH PECOT.

When a succession no longer needs administration and the administrator is discharged, and the heirs put in possession, the co-heir who is the holder of a note payable on the settlement of the succession, can bring suit against his co-heirs.

If there has been no settlement of the heirs of their respective claims, the defendant co-heirs can plead in compensation, debts due by the plaintiff heirs to them in the succession.

A PPEAL from the Twenty-fourth Judicial District Court for the Parish of St. Mary. *Allen, J.*

Walter J. Burke and Philip H. Mentz for Plaintiff, Appellee.

D. Caffery & Son for Defendant, Appellant.

Submitted on briefs January 7, 1897.

Opinion handed down February 1, 1897.

Rehearing refused March 15, 1897.

Coudroy vs. Pecot.

The opinion of the court was delivered by

MCENERY, J. The plaintiffs allege that they are co-owners and holders of a promissory note for two thousand one hundred and eight dollars and seven cents, secured by mortgage, made and executed by Anais Pecot and J. C. Pecot. The prayer of the petition is that Joseph C. Pecot be condemned to pay the above amount in principal and interest and for the recognition and the execution of the special mortgage securing said note. That Mrs. Angele Pecot be recognized as surviving widow in community of Pierre A. Coudroy, the payee on the note, and to be entitled to one-half of the amount of said note and interest, and that the children, issue of the marriage with Pierre A. Coudroy, be entitled to the other half.

The defendant filed an exception to the suit, averring that the same is premature, the obligation on which it is based not being due; that the note is payable at the date of the final settlement of the estate of Mrs. Charles Pecot, in which estate the exceptor and plaintiffs are heirs; that there had been rendered by the court an order placing said heirs in possession, but the avowed and only object of putting the heirs in possession was to enable the heirs in said estate to make title to certain property of said estate over to the Pecot Sugar Factory Company, Limited, a corporation organized by said heirs for the better management of their business of growing cane and manufacturing sugar; that but for the organization of said corporation and the necessity of making titles to it the order of putting the heirs in possession would not have been applied for, as the respective rights of the numerous heirs in said estate were then and are now unsettled; there being large and important accounts yet to be adjusted, and the final interests of the respective heirs yet to be fixed and settled; that the said heirs and plaintiffs understood then, and have since acknowledged that the said adjustment and settlement was yet to be made; that the plaintiffs are largely indebted to the said estate, as will be shown on such settlement, and that it was the intention at the time the obligation was made that the same should be paid principally out of the funds realized from said settlement.

This exception was overruled.

The defendant answered, reserving his exception, and alleging that the plaintiff was indebted to the defendant by reason of said want of settlement, and that this would offset the debt sued on.

There was judgment for plaintiffs, and defendant appealed.

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The issues presented are contained in the exception, and the answer and exception may both be considered at the same time.

The note sued on reads as follows: "At the date of the final settlement of the estate of Mrs. Felicite Sigur, widow of Charles Pecot, late of said parish, both deceased, we promise to pay to the order of Pierre A. Coudroy, the sum of two thousand one hundred and eight dollars and seven cents, with 8 per cent. per annum interest thereon from date until paid, for value received.

(Signed) "ANAIS PECOT.
"J. C. PECOT."


The act of mortgage recites: "Being the same fund due and owing to said Coudroy by the said Anais and Joseph C. Pecot on a final settlement and liquidation of all accounts between said parties on the 23d day of July, A. D. 1881, which said sum the said Madam Anais and Joseph C. Pecot hereby acknowledge themselves to owe * * * payable to the order of said P. A. Coudroy in the final settlement of the estate of Mrs. Felicite Sigur, widow of Charles Pecot, both deceased, and now in the course of administration and settlement.

The litigants are all heirs of Mrs. Felicite Sigur. Madam Anais Pecot is dead, and Joseph C. Pecot accepted her succession unconditionally.

On the application of the heirs of Mrs. Sigur, on the 29th of June, 1893, the District Judge rendered judgment discharging the administrator of her succession, as there was no longer any necessity for the continuance of the administration. The heirs were thus placed in possession and there was an end of it. It was settled so far as the law could settle it. We can not, notwithstanding the evidence discloses the fact, say that it was settled for a specific purpose, to enable the heirs to make title to property. The succession can not be considered as settled for one purpose only.

The suit was not, therefore, prematurely brought against the heirs who have been sent into possession.

But the note and mortgage are payable on final settlement of the administration. The discharge of the administrator does not carry with it a presumption that all the heirs interested in the property have had their claims adjudicated between them. There has been no settlement among the heirs. The note is payable on final settlement. It is to be interpreted as being payable on a final settlement between them.



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It is recited in the act of mortgage that the amount of indebtedness was ascertained on final settlement between the heirs on the day of the execution of the note. Having been made payable on final settlement of the estate of Mrs. Sigur, there was evidently in contemplation a further settlement to be made between them, or the payment was deferred until the settlement between them, in view of future transactions between them.

We think the defendant is entitled to present the defence which he urges, that on final settlement between the heirs it will be found that the plaintiff has no claim against the defendant.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided and annulled and reversed, and it is now ordered that the case be remanded with leave to defendant to urge any claims or offsets that he may have against the plaintiffs, his co-heirs, and with directions to the lower court to proceed to judgment after a trial of the issues herein indicated. Costs of appeal to be paid by plaintiffs, all other costs to await final judgment.

No. 12,801.

M. F. FISHEL ET ALS. VS. T. O. STARK ET ALS.

1. A party having become adjudicatee at tax sale, in 1875, of property on which there remained unpaid taxes of the year 1873, and thereafter having failed to pay the taxes of the years 1874, 1876 and 1877, it became subject to sale in 1889 under Act 82 of 1884.
2. The only legal effect of the first adjudication was to oust the title of the then tax debtor and vest it in the adjudicatee, but it did not hinder the tax collector from subsequently proceeding to make a sale under Act 82 of 1884 in the enforcement of taxes of 1874, 1876 and 1877.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Ernest T. Florance for Plaintiffs, Appellants.

Walter H. Rogers for T. O. Stark and W. H. Lockhart, Defendants,
 Appellees.

Paul L. Fourchy and *C. McRae Selph* for A. S. Gutierrez, Defendant,
 Appellee.

Fishel et als. vs. Stark et als.

Argued and submitted February 2, 1897.

Opinion handed down March 1, 1897.

The opinion of the court was delivered by

WATKINS, J. Plaintiffs, as the sole legal heirs of Lewis Fishel and of his wife, Frederica Metzger—both of whom are deceased—acquired by inheritance a certain tract of land, particularly described in their petition, situated in the city of New Orleans; and their averment is, that same was adjudicated to their father, at a tax sale made on 20th of April, 1875, and said sale was subsequently confirmed by the Auditor on the 18th of January, 1875, said property constituting a part of the matrimonial community.

They aver that their father was placed in possession of said property by the judgment of a competent court on the 21st of August, 1876, and that he has since remained and continued in peaceable possession thereof, until the 11th of November, 1892, when he sold his interest to T. O. Stark, one of the defendants.

They further allege that their deceased mother bequeathed to their father the disposable portion of her fortune, including the property in suit—that is, one-half of her estate; and that they consequently inherited an undivided one-fourth interest therein as their *legitime*—that is to say, one-fourth of the community assets.

Wherefore, their demand and prayer are for a partition in kind, and according to law.

Per contra the defendant, Stark, and the other defendants who trace through him, alleges that he purchased the whole of the property in controversy, at a tax sale made on the 12th of November, 1889, under and in conformity to Act No. 82 of 1884, in the enforcement of the delinquent taxes due on same for the year 1879, and prior years, and assessed to Mrs. Charles O. Hamilton, and that under said adjudication he immediately went into possession under a writ issued in the suit entitled *In re* T. O. Stark, for Possession, etc.

He further alleges that on the 11th of November, 1892, subsequently, he purchased the rights of Mrs. Widow Hamilton, now Mrs. S. B. Thrasher, the tax debtor; and that he also acquired by similar purchase all the rights and interests of Lewis Fishel—thus protecting his title by the tax adjudication.

In the alternative, there is in his answer urged a reconventional

demand for the sum of six hundred and ninety-five dollars and thirteen cents, amount of State and city taxes paid on the property since his purchase; the sum of two hundred and fifty dollars, amount paid Mrs. Hamilton for the transfer of her rights; and the sum of seventy-five dollars, the amount paid to Lewis Fisbel for the assignment of his rights. And also, for other costs and expenses amounting to two hundred dollars—all aggregating one thousand two hundred and twenty dollars and thirteen cents, for which he prayed judgment.

There were various exceptions filed and overruled; and other defendants filed answers similar to those of Stark.

On the trial there was judgment dismissing the plaintiff's suit, and they prosecute this appeal; and in this court they plead the prescription of three years, as a shield against the defendants' attack upon the tax adjudication to their father, which is their primordial title.

Reference to the tax collector's deed of 1875 will show that the adjudication was made for the unpaid taxes of 1873, under a *current* revenue law of that year; and that, six months later, that sale was confirmed by the auditor because there had been no intermediate redemption of the property.

But the record shows that on the 12th day of November, 1889, the tax collector, acting under and by virtue of Act 82 of 1884, adjudicated the property in controversy to the defendant, Stark, in the enforcement of the taxes due thereon prior to the 31st of December, 1879—including those of the years 1872, 1877 and 1878, amounting to one hundred and thirty-four dollars and fifty cents.

The *proces verbal* of sale, amongst other things, recites, that said property had been duly and legally assessed for those years, as that of Mrs. Charles Hamilton.

The record further shows that under a writ of possession, regularly and formally issued and served, the purchaser was sent into possession conformably to law and the aforesaid adjudication.

There appears in the record a statement of the taxes which the defendant, Stark, as purchaser, assumed as part of the purchase price, and which he paid—including those of the years 1874, 1875, 1876 and those of 1880 to 1894, inclusive, aggregating in capital the sum of six hundred and sixty-five dollars and sixty-one cents.

Conceding for the argument all that is claimed by the plaintiffs, it is quite evident that their ancestors failed, during the years subse-

Michener et als., Trustees, vs. Reinach.

quent to their purchase in April, 1875, to keep down the taxes on the property, and it consequently became amenable to tax sale again in 1889, when the defendant, Stark, became adjudicatee under Act 82 of 1884.

In our view there is no room for doubt of the legality or validity of the adjudicatee's title.

The Fishel heirs have only the standing in court of their ancestors, and it is of no consequence that they acquired title at tax sale.

Its only effect in law was, or could be, to oust the then tax debtor and vest his title in Fishel as adjudicatee. The property having been subsequently assessed, and the proper assessment having been carried on the roll, it was liable to sale under Act 82 of 1884.

The principles upon which such a sale as this is sustained have been so frequently announced that it is deemed unnecessary to repeat them; hence we merely refer to a few of the adjudged cases, to-wit: *In re Orloff Lake*, 40 An. 147; *In re Douglas*, 41 An. 765; *Dibble vs. Leppert*, 47 An. 792; *Remick vs. Lang*, 47 An. 914.

Regarding the decree appealed from as a final judgment, it is affirmed.

No. 12,305.

LOUIS T. MICHENER ET ALS., TRUSTEES LAND TRUST OF INDIANAPOLIS, INDIANA, VS. JACOB A. REINACH.

APPEAL from the Civil District Court for the Parish of Orleans.
King, J.

E. Howard McCaleb for Plaintiffs, Appellees.

Benjamin Ory for Defendant, Appellant.

Argued and submitted February 7, 1896.

Opinion handed down February 17, 1897.

The opinion of the court was delivered by

McENERY, J. For the reasons assigned, *ante*, p. 860, between same plaintiffs and defendant, the judgment appealed from is affirmed.

Railway Co. vs. Roberts.

No. 12,811.

49 859
121 800

KANSAS CITY, SHREVEPORT & GULF RAILWAY COMPANY VS. A. V. ROBERTS.

The reconventional demand for damages brings up the issue for our determination.

Value of the Land.—The jury's estimate of the value of the land expropriated for a roadbed was supported by the weight of the testimony. It is affirmed.

General Damage.—The other items of damages were examined; some of them were lowered, and in consequence the items grouped as "general damages" were reduced to one thousand and ninety dollars.

Costs.—The rights of the parties as relates to costs were correctly passed upon by the District Court.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

William Goss for Plaintiff, Appellant.

Lee & Liverman for Defendant, Appellee.

Argued and submitted January 20, 1897.

Opinion handed down February 1, 1897.

The opinion of the court was delivered by

BREAUX, J. This was an action brought by the plaintiff against the defendant to expropriate a tract of land, one hundred feet in width, through the latter's plantation for a right of way.

Plaintiff's right of expropriation was not disputed by the defendant, who pleaded in reconvention:

" Value of fourteen acres right of way.....	\$350 00
" GENERAL DAMAGES—	
" Value of pasture destroyed and moving fence	75 00
" Damage to spring.....	200 00
" Sugar cane planted	125 00
" Damage to gin house and loss of patronage.....	880 00
" Damage to water tank.....	2,000 00
" Other damages.....	500 00
	<u>\$4,180 00"</u>

The case was tried before a jury. The verdict was for plaintiff, expropriating the land. On the reconventional demand the defendant was awarded the sum of two hundred and eighty dollars, value

Railway Co. vs. Roberts.

of the land, and the sum of one thousand three hundred and thirty dollars, general damages.

The plaintiff was further condemned "to provide and keep in repair sufficient crossings and cattle-guards for the use of defendant's plantation, also to keep in repair the mill pond.

The plaintiff prosecuted this appeal.

The defendant, in the answer to the appeal before this court, asked for amendment of the judgment appealed from, in manner and amount prayed for, in his answer and demand in reconvention filed in the lower court.

The amount allowed for the value of defendant's land presents the first question for our determination. It was considered by the jury as a separate item, and it found that it was worth twenty dollars an acre.

The complaint is that the jury failed to distinguish between the actual value of the land taken and damages arising from the fact of taking a small strip of land through defendant's plantation; which is covered by his claim for general damages.

We have not found that the complaint is properly founded. Three of plaintiff's witnesses testified as to the value of the land. One of these two witnesses said that land is not worth any more where a railroad takes a strip of a hundred feet through the centre of a house or a plantation than land in a body. Which is the correct view in fixing a positive value? This witness, with exact judgment in regard to value, said finally in answer to the question:

"Then it is worth more than ten dollars an acre?"

A. "I stated that it was worth about that. The other witnesses for plaintiff valued it at much less."

Four witnesses testified on the part of the defendant. Their testimony and that of the defendant himself place a higher value on the land than the amount of the verdict. It is true that the estimates vary considerably between the *maximum* of value as sworn to by plaintiff's witnesses and the amounts stated by defendant's witnesses as the value.

Land which produces three-quarters of a bale to the acre is worth more than ordinary land, although to produce this quantity the field was fertilized.

The verdict adopted, we think, is the correct medium between these respective estimates.

Railway Co. vs. Roberts.

The next amount claimed was for moving the fence on defendant's land and the loss of his pasture land. This and all other items are included (save the value of the land, as before stated) in the amount of thirteen hundred and thirty dollars allowed by the verdict for damages.

The number of yards of fence removed was six hundred and the number of acres in the pasture was nine. Building the road, as we understand, made it necessary to remove the fence and abandon these nine acres as pasture lands.

It caused some damage and was a proper subject to be considered by the jury.

The testimony was not rebutted and fixed the amount correctly, in our judgment.

With reference to the spring, the next item of damages claimed, the defendant urged that before the construction of the roadbed, it furnished him water for his stock, for the use of his family (washing), and for the tenants (but it never was, it appears, a strong spring). The defendant also averred that since the construction of plaintiff's roadbed this spring does not furnish half as much water. He apprehended, he asserted, that it will entirely fail. He has, in addition, only a small well which furnishes a scant supply of water.

The evidence does not sustain the correctness of the amount claimed for this spring, nor that it has been damaged to any great extent. The amount allowed should be very much less than the amount claimed.

For the acres planted in cane, destroyed, it is not denied, by the railroad hands, an amount was unquestionably due by the plaintiff, although it should be less than claimed.

Damage to gin house and loss of patronage the defendant fixed at eight hundred and eighty dollars. The steam gin operated by the defendant is at a distance of about one hundred feet from the railroad. He complains that the proximity of the road increases the danger from fire, and the testimony shows that several of his customers declared that owing to the increase of danger from fire they would not gin their cotton at his gin.

The evidence to sustain this claim is not clear and satisfactory; besides the claim itself is in character remote and consequential. Something should have been allowed, much less, however, than is claimed.

The next item is for damages to the artificial pond of the defendant that supplied water to run his gin. The preponderance of evidence shows that the new pond holds more than the old pond held. The lift of the water from the pond to the gin is a little more difficult and requires a few more pounds of steam. The defendant consented to the change as made. The maxim *volanti non fit injuria* applies. We infer from the defendant's testimony that the water facilities are about the same as they were before the new pond was made.

There was an item in addition for general damages growing out of the difficulty caused in crossing and recrossing the railroad track on the place, the inconvenience occasioned by the road and other alleged annoyances.

We footed up these damages as well as we could, at one thousand and ninety dollars. It is true that the verdict of the jury is entitled to great weight and that it should not be disturbed, unless manifestly erroneous. We did not have before us the different items found by the jury in determining the amount of damages.

The total of items of damages found by us is less. We have not discovered that the difference between the amount of our decree and that of the verdict is sustained by the weight of the testimony.

With reference to the condition included in the judgment of the lower court, about repairing the pond and other repairs, the plaintiff urged that they were not an issue of the case. They were closely related to the issues and were made evident during the trial without any objection. Evidence, admitted without objection, may be considered, and the issues it represented, determined, although not supported by the pleadings.

A rule has been filed to have taxed as costs against the plaintiff, the mileage and *per diem* of the jurors summoned in accordance with Art. 2632, C. C.

The judgment correctly rejected the demand. Vicksburg, Shreveport & Texas Railroad Co. vs. Hart, 15 An. 507; City of New Orleans, praying, etc., 20 An. 394.

It is ordered adjudged and decreed that the judgment appealed from be amended by reducing the amount allowed by the lower court for "general damages" (*viz.*: one thousand three hundred and thirty dollars) to one thousand and ninety dollars, the amount awarded by this decree for general damages. As amended the judgment is affirmed at appellee's costs.

Ellerbe vs. Minor.

No. 12,828.

G. HERBERT ELLERBE VS. HENRY C. MINOR.

A contractor is responsible for the damages resulting from his failure to complete the work in time.

The price was due, less the damages.

There was no negligence or failure of the defendant to take reasonable precautions to reduce the damages.

The operations usual in saving a crop of cane were those adopted in matter of grinding defendant's cane.

The evidence is indefinite; the amount and value of the unfinished work was not shown. We are not satisfied that justice requires a disturbance of the judgment of the lower court.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Terrebonne. *Caillouet, J.*

Philip H. Mentz for Plaintiff, Appellant.

L. F. Suthon for Defendant, Appellee.

Submitted on briefs January 4, 1897.

Opinion handed down January 18, 1897.

Rehearing refused March 1, 1897.

The opinion of the court was delivered by

BREAUX, J. This action was brought by the plaintiff for one thousand five hundred and forty-one dollars and four cents, balance claimed on a written contract for which he recovered judgment subject as credit, to a portion of the amounts which the defendant in his reconventional demand claimed as due.

The amount of the demand in reconvention is within the jurisdiction of this court, and the reconventional demand alone is before the court. From the judgment (on this reconventional demand) the plaintiff and the defendant prosecute this appeal.

The facts are that the plaintiff, Ellerbe, agreed to lay a railway on defendant's plantation; to furnish the materials and to erect two cane hoists.

The defendant avers that the track was to be completed and

Ellerbe vs. Minor.

ready for use by September 15, 1894, in time for hauling his cane crop.

He alleges that he had not the use of the railway in time to haul his entire crop and that he had to expend an amount for putting the track in proper condition. The consequent damages he claims aggregating two thousand and six hundred dollars.

The first issue here involved is non-performance of the contract by plaintiff within the specified time and damage for consequent breach.

The questions are principally of fact. We have, for that reason, made as complete a summary as possible of the testimony of the witnesses.

The plaintiff in his testimony as a witness admits that the road was not completed and ready for service at the date stipulated in the contract. It appears that on the 5th of November the road was not completed. On that date the plaintiff informed the defendant, Minor, that there was no objection to his using the road, when safe for the running of cars and locomotives, and further that such use would not be considered by him as an acceptance of the road.

The civil engineer who had charge of the construction for the plaintiff testified, that one-half of the road was completed about the first of November, and the remainder about the middle of that month, at which time it was in sufficiently good order to be used.

Subsequently, the witness says, he told the defendant that the road was completed about the 18th or 20th of November, and that about a week after the defendant had it inspected while the witness, who was a subcontractor or had some interest in the work, was on the plantation, and had been informed that an inspection would be made.

The road, although inspected, was not inspected by a civil engineer, as required by one of the stipulations of the contract.

A roadmaster of the Southern Pacific made the inspection. It was objected that he was not qualified to pass upon the work as required by the contract. His opinion was that the work was roughly done and not at all in a workmanlike manner. Another witness testifies that the grinding of cane began on the 11th of October. He was the engineer at the mill.

He corroborated, in some respects, the testimony of the witness who made the special examination of the track. He testified that

the cars were received on defendant's plantation a few days before the grinding began. A part of them were ready for use on the day the defendant began hauling his cane and the remainder a few days thereafter.

The manager of the plantation testified that there was considerable delay in completing the road; that the first cane hauled in the cars over the railroad was on the 9th of November; that from the 11th of October to the first date, cane was hauled to the sugar house in wagons, and that altogether, between those dates 6926 tons were hauled in wagons; that the difference in favor of cars, as between cars and wagon hauling, is twenty-three and one-half cents in favor of the former.

With reference to minimizing damages, he testifies that the defendant began to cut his cane and to haul it from places in the fields most advantageous to the proprietor, having in view the saving of the crop, and that the operations in taking in the crop were conducted with due regard to lessening the loss.

As to any necessity to have placed the plaintiff in default as a condition precedent to a demand for damages.

By the conditions of the contract the subsequent agreement between the parties to the contract and the admission of plaintiff as a witness during the trial, we think we are justified in concluding that it is not an issue in the case.

Moreover, it is not referred to in plaintiff's brief.

We pass from it and take up the actual issues before us for decision.

The plaintiff, in view of the facts, is only bound by the loss defendant has sustained growing out of the failure to timely complete the work required by the stipulations of the contract. C. C. 1934.

The difficulty of determining the amount of the loss with precision is manifest. In appreciating the facts and fixing the amount due the rules of equity necessarily must have great weight.

First, as to the failure to complete the road in time and the extent of the loss it occasioned.

The weight of the testimony amply shows that the road was not ready for use before November 9.

The testimony is conflicting as to the date the defendant was ready with his cars to begin hauling. The District Judge fixed the 11th of

Ellerbe vs. Minor.

October, the date this hauling commenced, and as the day the defendant had a sufficient number of cars ready for use, if the road had been ready to obviate the more expensive hauling with wagons. The testimony would not warrant us in disagreeing with the court *a qua* as to this date.

We think it is correct and that it was not improperly determined, that the defendant, under the conditions of the contract, was entitled to the use of the road on the 25th of September, in order to be amply in time to haul his cane, and that on the 11th of the month following he had a sufficient number of cars to haul his cane. It is true that there was some delay in setting up the cars. The fact remains that there were a number of them ready for use on the 11th, and the gist of the testimony is that all the hauling would have been by cars had the road been ready for use at the time agreed upon.

The plaintiff, in the second place, urges an objection that it was the duty of the defendant to minimize his losses when he saw them approaching.

The principle stated implies that one who has been negligent should not recover the damages he might have avoided. The evidence does not disclose that the defendant was negligent or that his acts were such as to aggravate the loss. He could not be expected to lessen the possibility of saving his own crop, or of incurring a loss in the cane's yield, by cutting and hauling cane with the view of minimizing damages. We are informed by the testimony the defendant began by cutting his stubbles at places in the field as in preceding years.

The usual judgment in such matters was exercised, and there was no improper act in this respect giving ground for complaint. The object, it was said—and it was not contradicted—was to save the crop. In this plaintiff also had an interest. In case of loss of crop a question of damages might have arisen.

The plaintiff, appellant, in regard to the damages we have discussed, urged that no damages should be allowed, while the defendant claimed a larger amount. We think the judgment is substantially correct.

The defendant also claims that the track was so defective and badly made that he was put to an expense of seven hundred dollars to put it in proper condition.

A plea in reconvention, in order that it may be allowed and judg-

Ellerbe vs. Minor.

ment granted thereon, must be sustained by testimony proving up the claim pleaded.

In general terms the defendant testified that his expenses to repair the deficiency in the work was about the amount claimed.

No account was kept, at any rate there is no account of record and not one of the items of these expenses were proven by reference to the item itself. No legal claims for damages on this ground is made out.

The defendant has had his day in court and has failed to make satisfactory proof of his claim for repairs. We do not think that he is entitled to a non-suit.

The purpose of the suit was to settle the mutual claim pleaded.

The defendant having failed to sustain his plea with sufficient evidence, we do not think that the rule applying would justify us in dismissing the demand as in case of non-suit.

Moreover, the facts and circumstances were such as to require a notice to the contractor from the owner before undertaking and finishing the unfinished work.

Another question of fact involved here was as to cane hoists. They did not, at first, prove satisfactory and some change had to be made. The estimate of the needful cost chargeable to plaintiff varies. The amount of credit given in the judgment for the change made, we think, should remain as it is.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

The application is based principally upon fact. The defendant claims that on his reconventional demand, damages should have been allowed for twenty-nine days instead of fifteen days.

We have re-examined the record and have found that the manager of defendant's plantation testified that the first cars to be used on the road in question were received between the 8th and 10th of October, and that the whole eighty cars were ready for use fifteen days from the day the first car arrived.

This statement, we think, is supported by the weight of the testimony of the other witnesses and sustains the correctness of the number of days fixed by the decree.

With reference to the item for alleged extra work, in that respect also we have found no cause to alter our decree.

Rehearing refused.

 Succession of Robertson, Jr.

No. 12,322.

SUCCESSION OF R. L. ROBERTSON, JR.

The will in controversy was written on a printed heading.
 An olographic will must be entirely written, dated and signed by the testator.
 However conclusive the evidence that it contains the dispositions of the testator,
 it is none the less null, unless the essential formalities are complied with.
 The date includes the year, month and day, any one of which being missing is fatal to the validity of the will.
 The document attests the "printed heading" and shows conclusively that the date was not written by the testator; the testimony of witnesses (whose attention, it appears, was not called to the printed headlines) "that the will was written by the testator" will not overcome the fact made manifest by the testament itself, that it was not entirely written by the testator.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict for Executrix, as such and individually, Appellant.

Buck, Walsh & Buck for Mrs. Cora Robertson Cuevas, Opponent,
 Appellee.

Argued and submitted February 5, 1897.

Opinion handed down February 15, 1897.

Decree supplemental and rehearing refused March 4, 1897.

The opinion of the court was delivered by

BREAUX, J. This appeal is prosecuted from a judgment of the District Court in which it is decreed that the will of R. L. Robertson, Jr., probated on the 6th day of August, 1895, is a nullity.

The following is a copy of the olographic will annulled:

"NEW ORLEANS, December 12, 1892.

"I, Richard Lamb Robertson, being of sound mind and body, and in full possession of all my faculties, do make this my will and testament:

"To my dearly beloved wife, Cora Celeste Davidson, I owe all my present prosperity, and I give to her all my personal property, and leave to her the usufruct of all my estate during her life.

Succession of Robertson, Jr.

"I also appoint her my sole executrix, without bond and with full seizin.

(Signed)

"RICHARD LAMB ROBERTSON.

"Witness: JOSEPH B. WOLFE, JR."

We have had occasion to refer to this testament in a case heretofore decided, having the same title. Succession of Robertson, 49 An. , No. 12,191.

The will, the validity of which was assailed, was written on one of the letter-heads of the testator, having the words "New Orleans" and the figures "189" of the year in print. The following is the only written date of the will: December 12-2. The appellant widow of the deceased R. L. Robertson, Jr., urges that the will in contest fulfills all the requirements of the law.

The requisites under the article of the Civil Code, to the validity of the olographic will, "that it be dated," does not import the necessity of mentioning the place at which it was dated.

The printed words, "New Orleans," give rise to no issue in the case. It is different in regard to the date of the will, which, in order to be valid, must be "entirely written, dated and signed by the hand of the testator." Under the precise language of the article, the date is one of the essential formalities of an olographic testament. The nullity is formally pronounced by the law itself. It has been decided that absence or uncertainty of the month or the day of the testament, is cause to decree it null; for better reason, the ruling should be the same where the year is not stated or is left to mere conjecture. The "year" printed or written by another is not a date in the hand of the testator, made the essential of a valid will. The law enjoins the date on two grounds: the first, the most essential, is in order that the precise date the testator made a disposition of his property may be known, rendering it possible to determine whether the testator had the capacity of giving at the time the testament was made.

The second ground is secondary; if there are two testaments, it should be manifest which is the last, in case of opposing or incompatible disposition.

In either case, the date written by the testator is an essential. We have cited these "motives" or grounds in support of the *raison d'être* of the law, but without these "motives" or grounds, it is enough to

Succession of Robertson, Jr.

justify the decree declaring the will null that a substantial condition to its validity is lacking.

In *Lewis' Heirs vs. Executor*, 5 La. 396, this court said: "The law, in its anxiety to guard against the testator being circumvented or practised on, will not permit a testament to have any effect, no matter how strong the moral evidence may be that it contains truly his last disposition of his property. The formality (our Code says) must be observed, otherwise the testaments are null and void. * * *

"Courts of justice, therefore, can do nothing else but inquire, when a case of this kind arises, whether the formalities have been pursued."

The appellant insists that there is no proof before the court that the date was printed as stated, and urges that in these days of skilled penmen and draughtsmen, the eye to which print or engraving is manifest can not always be trusted in opposition to the oath of three reputable witnesses.

The testament as written by the testator is before us. It is manifest that the date is printed. The testimony of witnesses, whose attention was not directed to the printed heading of the paper on which the testimony was written, can not make that to be written which is not written.

It is too plain to admit of question that the words and figures are printed.

Lastly, the appellant cites authorities in support of the proposition that writing, in its legal sense, includes what is printed as well; that while it is decided, for instance, to be essential to a deed that it should be in writing, yet printed forms have been in use from time immemorial. The appellant also quotes the definitions from a number of dictionaries as evidence that writing not only means words traced with the pen or stamped, but printed or engraved words. The argument would lead to the conclusion that it would be possible for a printer or engraver to print or engrave a portion of his testament.

Writing must be taken in its ordinary sense: to set down legible characters with pen and ink. The writing essential to a deed may include printed words without violating a prohibitory law.

But in the matter of an olographic testament, it must be written the pain of nullity is inevitable.

The judgment is therefore affirmed.

Tax Collector vs. Clock Co. et als.

ON APPLICATION FOR REHEARING.

MILLER, J. On the previous appeal in this succession we disposed of all the questions at issue between these parties except those relating to the validity of the will and the appointment of an administrator. It was not our purpose in the judgment on this appeal to disturb our previous decision, but to annul the will. On this application it is brought to our notice that our decision on this appeal affirming that of the lower court goes beyond our purpose. The necessity of the appointment of an administrator for this succession is not apparent, as the administration appears to have been completed by the executrix under the will which our decision annuls. We will leave that question open.

It is therefore ordered, adjudged and decreed that our decree on this appeal be amended as herein stated, and accordingly it is now ordered, adjudged and decreed that the judgment of the lower court be affirmed in so far as it decrees the nullity of the will of the deceased, R. L. Robertson, Jr., and in all other respects that said judgment be avoided, annulled and reversed, reserving to the parties the right to provoke the appointment of an administrator if in the opinion of the lower court any such appointment should become necessary.

No. 12,343.

J. H. KIRKPATRICK, TAX COLLECTOR, vs. THE DAVIS CLOCK CO.
ET ALS.

The occupation of carrying clocks in a one-horse vehicle and selling them to those disposed to buy, subjects the party pursuing the occupation to the peddler's tax prescribed by the eleventh section of the Act No. 38 of 1894, not to the tax of travelling vendors imposed by the Act No. 150 of 1890.

APPPEAL from the Third Judicial District Court for the Parish of Orleans. *Barksdale, J.*

M. J. Cunningham, Attorney General, and *E. H. McClendon*, District Attorney, for Plaintiff, Appellee.

Jno. R. Phipps and *J. E. Moore* for Defendant, Appellant.

 Caperton & Dreyfous vs. Forrey & Trammell et al.

Argued and submitted January 21, 1897.

Opinion handed down February 15, 1897.

The opinion of the court was delivered by

MILLER, J. The appeal is by defendant from the judgment imposing on it a license tax as traveling vendor of clocks.

The only business of defendant is that conducted by its agent who carries his clocks in a one-horse hack, and sells them on his rounds through the parish to those disposed to buy. Defendant's contention is that the only license there can be exacted for that business is that required of peddlers and hawkers on foot, horseback, or carrying his wares on a horse or other vehicle. Act No. 38 of 1894, Sec. 10. There is, in our view, a clear application of this peddler's tax to the occupation of defendant's agent, and hence the defendant is not subject to that section of the act of 1890 on "traveling vendors," under which the license tax in question was sought to be exacted.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed and plaintiff's rule dismissed at his costs.

No. 12,360.

CAPERTON & DREYFOUS VS. FORREY & TRAMMELL ET AL.

Damages, not specific performance, is the usual relief for violation of contracts, when the loss to the injured party is susceptible in compensation in money. C. C., Art. 1927.

An obvious limitation of the power to compel specific performance arises when the act required to be performed is beyond the ability of the defendant.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

Leonard & Randolph for Plaintiffs, Appellants.

Alexander & Blanchard for Youree, Defendant, Appellee.

Argued and submitted January 20, 1897.

Opinion handed down February 15, 1897.

Decree supplemented and rehearing refused March 1, 1897.

40	872
117	282
49	872
125	534

The opinion of the court was delivered by

MILLER, J. The plaintiffs, appellants from the judgment dismissing their demand, sued to compel the defendants to close a door opening from premises leased by one of defendants to a party not before the court.

The defendants Forrey & Trammel leased from Youree, the other defendant, a hotel, the corner of which on the lower floor was used as a saloon, the lessor binding himself not to lease for saloon purposes another building owned by him designated as No. 308; thereafter the defendants leased the corner to plaintiffs, the lessor of defendants joining in that sublease and agreeing that plaintiffs should have the benefit of the stipulation not to lease No. 308 for saloon purposes contained in the lease to defendants. The defendant Youree, thereafter, did lease No. 308 with the stipulation it should not be used for saloon purposes, but gave to the lessee the control of the doors, one of which, as we understand the record, opens into the corridor and rotunda of the hotel which adjoins No. 308. The lessee of 308 also is lessee of Nos. 306 and 310 on either side of 308. The purpose of the stipulation not to lease No. 308 for a saloon was obviously to protect plaintiffs leasing the corner for saloon purposes, against the competition of the same business if carried on in 308, with an opening into the rotunda, and this stipulation the defendant Youree sought to observe in his lease of 308. But the lessee of 308, 306 and 310 discontinuing the use he had made of 308, which we infer was that of a restaurant and bar, has established a bar in 310, easy access to which is obtained by opening a door leading into the hotel rotunda and through which the hotel guests and habitues enter on a passage leading directly to the bar established in 310 and in full view from the passage. Thus, the plaintiffs complain that though the prohibited use is not made of 308, the competition with their business is accomplished to their injury by the door opening from 308, and this is, they aver, practically a violation of the agreement of the defendants in their lease to plaintiffs of the corner.

The suit is in effect for the specific performance of an alleged contract. Suits of this character are not entertained unless the right is clear and the remedy plain and free from difficulty. As a general rule, when the wrong to be redressed admits of compensation in money, the law confines the relief to an action of damages. Civil Code, Arts. 1984, 1935, 1927; 1 Story Equity Jurisprudence, p. 714,

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as to specific performance. *Rice vs. Rice*, 46 An. 712. Here the wrong done is the diversion of plaintiff's custom, clearly compensable in damages. The relief asked is that these defendants close a door on the premises of another party. The defendants have no control over the door and could exercise none without violence. Whether defendants have violated their contract with plaintiffs we are not called upon to determine, but it seems clear that the court is powerless to grant the relief sought.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

ON APPLICATION FOR REHEARING.

MCENERY, J. Plaintiffs apply for a rehearing solely for the purpose of requesting the court to amend the decree, reserving all rights and actions plaintiffs have to recover damages against defendants. While it is unnecessary to thus amend the decree, we will do so.

The decree heretofore rendered in the case is therefore amended, so as to reserve to plaintiffs all rights and actions they may have against defendants for damages. This amendment to the decree will not release plaintiffs from costs.

 No. 12,370.

ERNEST B. BAKER ET AL. VS. JOHN M. LEE AND JULE W. PARKS.

1. When mortgage creditors with a common interest, whose aggregate claims exceed two thousand dollars, unite in a suit to have canceled, on the ground of simulation, a mortgage exceeding two thousand dollars, the judgment in their suit is appealable. 2 An. 984; 43 An. 1041; 2 An. 908; 35 An. 206.
2. The sheriff's act of sale stating compliance by the purchaser with the terms of sale, spread on the public records, will protect the *bona fide* mortgagee who acquires his mortgage for value from the recorded owner on the faith of his title. This case is distinguished from that of the *People's Bank vs. David*, recently decided.
3. The members of a planting firm acquiring immovable property become joint owners, and a mortgage by one, though using the firm name, will bind only his half of the property. C. C., Art. 2870, par. 5; 3 La. 497; 10 La. 420; 17 La. 596; 47 An. 346.
4. A mortgage can not be established by parol, nor will a ratification in writing relate back so as to give that validity to the prejudice of other creditors to the alleged mortgage it did not possess when executed. Civil Code, Art. 3365; 2 La. 572.

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5. The clerk of the District Court, *ex-officio* parish recorder, is liable for the loss arising from his omission to record in the book of mortgages and privileges an act of sale placed in his hands, giving rise to the vendor's privilege and reserving a mortgage for the unpaid portion of the price. Constitution, Art. 121; Revised Statutes, Secs. 3550, 3590, 3068, 3094; C. C. 2284.

A PPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Potts, J.*

Gunby & Sholars and *A. A. Gunby* for Plaintiff, Appellant.

Boatner, Potts & Hudson for Meyer Brothers, Defendants in Rule, Appellees.

Stubbs & Russell for C. C. Madden, Defendant and Appellant.

E. T. Lamkin for I. Garrett, Defendant, Appellee.

Argued and submitted January 22, 1897.

Opinion handed down February 1, 1897.

Decree supplemented, rehearing refused March 1, 1897.

The opinion of the court was delivered by

MILLER, J. This appeal is by plaintiffs, heirs of one of the parties in a partition suit from the judgment on their rule to erase a mortgage granted by the adjudicatees of the succession property, and which ranks that of the heirs upon the property to secure the price of the adjudication. The defendants in the rule were those holding the mortgage notes of the adjudicatees and the sheriff and the clerk. The mortgage securing these notes was attacked as fraudulent; the petition further avers that the property, having been purchased at a sale made to effect a partition in which minors were interested, the sale being on terms part cash and part in the notes of the adjudicatees now held by the plaintiffs, the heirs, that no title vested in the adjudicatees without payment of their notes, and hence the mortgage granted by them is void. In the petition it is also claimed that the mortgage assailed was not executed by the adjudicatees, because signed in the name of their planting firm by one of them; and it is

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charged also that the mortgage notes given by the adjudicatees were acquired by defendants after maturity and with knowledge that the notes were fictitious. The clerk and sheriff are sought to be held in the event of the failure of the attack of plaintiffs on the mortgage. Their liability is urged on the ground of their omission to record the sheriff's act of sale of the succession property, the judgment in the partition suit directing that the credit portion of the price should be secured by mortgage, which duty imposed by the judgment could only be accomplished by the registry of the act as a mortgage, and by the omission of this duty the adjudicatees were enabled to create the mortgage the heirs now find opposed to them. The defendants, the note holders, deny all allegations impugning their mortgage, aver the acquisition of the mortgage notes in good faith for value and before maturity, and the sheriff and clerk deny liability. The judgment of the lower court maintained the mortgage granted by the adjudicatees, dismissed the demand against the sheriff and decreed the clerk liable for the notes held by plaintiffs in rule. From that judgment this appeal is by plaintiffs and the clerk.

There is a motion to dismiss the appeal on the ground that the notes held by each of the heirs is not sufficient to give jurisdiction. The heirs or some of them join in the rule to erase the defendant's mortgage. The amounts of the notes held by them exceed two thousand dollars. The mortgage attacked by them is seven thousand dollars. It is virtually a contest as to the validity of this mortgage, each in amount exceeding two thousand dollars. The plaintiffs have a common interest and the defence is the same of each note holder claiming adversely to the plaintiffs. We think the case is appealable. *Williams vs. Vance*, 2 An. 908; *Colt vs. O'Callaghan*, 2 An. 984; *Kahn & Bigart vs. Sippill*, 35 An. 1041; *Bier vs. Gautier & Godchaux*, 35 An. 206.

The sale of the property was made by the sheriff in precise accordance with the order of the court, the price payable part cash and the residue in notes, the usual mortgage to be retained. The adjudicatees were John M. Lee and J. M. Parks. The purchasers complied with the terms; the act stated that compliance and the reservation of the mortgage to secure the credit portions of the price. The sheriff handed the act to the clerk *ex-officio* the recorder, but he failed to record the act in the appropriate book to exhibit mortgages

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and privileges. Thereafter, the mortgage was executed by the purchasers under which defendant's claim, the mortgage certificate exhibiting no mortgage to secure the price of the adjudication by the sheriff. The effort of the plaintiffs is to overcome the difficulty they encounter in this mortgage of the adjudicatees, and that difficulty is due to the omission of registry of the mortgage arising in plaintiffs' favor as heirs from the sheriff's sale of the succession property.

The sheriff's sale passed the ownership. The title of the purchasers standing on the records gave validity to the mortgage granted by them. *Richardson vs. Hyams*, 1 An. 286; *Boudreau vs. Bergeron*, 4 An. 84; *Thompson vs. Whitbeck*, 47 An. 49. The act announced that a mortgage was reserved for part of the purchase price, but that recital was not at all restrictive, but, on the contrary, affirmed the right to sell subject to such mortgage as the records might show. In the recent case of *The People's Bank vs. David*, ante, p. 344, the act relied on to convey ownership shows on its face that no cash was paid, but was yet to be paid to complete the partition, and we held the act was notice to the parties who took a mortgage with knowledge of this incomplete title of the mortgagors. Here the title of the purchasers at the sheriff's sale was complete by the payment of the cash and the giving of the notes required by the terms of the sale. The mortgagee had no duty to see that the notes were paid. If not paid, he had the right to assume that the mortgage certificate would disclose the non-payment. The mortgage, never recorded, resulted in the} furnishing a clear certificate on which the defendants in rule acted and had a right to rely. We think, therefore, the non-payment of the notes given by the purchasers affords no ground to attack the mortgage they made.

The mortgage granted by the purchasers, as is usual when negotiable notes are to be issued, is in favor of a nominal party. The testimony shows that the notes were afterward acquired for value before maturity by the present holders. The fact there was no debt due to the mortgagee named in the act is no ground to assail the mortgage, nor does the taking the notes as collaterals for debts of the mortgagors at all affect the title of the parties as holders for value. *Brewer vs. Gay*, 24 An. 35. The testimony, however, discloses that there has been a payment to one of the holders, the Ouachita Bank, on account of the principal debt, the credit

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for that payment being in suspense by a garnishment from the other note holder, Meyer Bros. It seems to us that credit should be attributed to the debt of one or other of these parties, and thus the amount of the mortgage notes having priority over plaintiffs' debt may be diminished. So, again, the testimony shows an attachment by Meyer Bros. against the mortgagors, and the result of that attachment is not ascertained. It may be that there is a credit from this source on the Meyer debt, and a consequent diminution of the amount they are entitled to claim on the collateral mortgage note. The plaintiffs in the rule must, of course, suffer by the omissions to record their mortgage, but they are entitled to have the mortgage confronting them reduced by all proper credits, and as this suit will have to be remanded, our decree will provide for the ascertainment of all credits.

The extent of the mortgage of the defendants in rule is the next inquiry. It is too clear to need more than the statement that John M. Lee and J. W. Parks were joint owners by their purchase at the sheriff's sale, and neither could mortgage the undivided half of the other. The act of mortgage is signed Lee & Parks, and is executed by Lee alone. It is now claimed that Parks authorized its execution. Under our law the mortgage must be in writing, and parol proof is inadmissible. Hence the effort to show by testimony that Parks authorized the mortgage must fail. Civil Code, Arts. 2870, 3365, par. 5; Skillman vs. Purnell, 3 La. 497; Bach vs. Ramos, 10 La. 420; Calder & Co. vs. Their Creditors, 47 An. 846; Moore, Collins' Administrator, vs. Louaillier *et al.*, 2 La. 572. Nor is the position of defendants in rule improved by the written ratification tendered on the trial of the rule by Parks of the mortgage by his planting partner. If there was no mortgage effected on Parks' one-half by the mortgage signed by Lee, it could not be created by a ratification tendered afterward; at least not to the prejudice of plaintiffs. It results that the mortgage is operative only on the one-half of Lee.

The clerk of the District Court is under the Constitution parish recorder. Art. 121. It is his duty to record all acts embracing a mortgage or privilege on the book provided by law for such registry. Revised Statutes, Secs. 3550, 3080, 3066, 3083, 3094; C. C., Art. 2284. The act of sale by the sheriff under consideration in this case was delivered to the clerk by the sheriff, and the duty of registry was at once imposed on the clerk by the law. It is of no avail to urge that no instructions to register were given by the parties or by the

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sheriff. The law gave the direction. We are of opinion, therefore, that the clerk is responsible for the omission to record the act, the omission resulting in enabling the purchasers at the sheriff's sale to create the mortgages on the property which defeats that in favor of the heirs directed to be reserved by the judgment in the partition suit.

We are asked to reverse the judgment of the District Court and hold the sheriff liable. His function, we think, was fully discharged when he delivered the act to the clerk. No instruction from the sheriff was requisite.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed in so far as it dismisses the demand against the sheriff, in other respects be avoided and reversed; and it is now ordered, adjudged and decreed that the mortgage securing the notes held by the Ouachita National Bank and Meyer Bros. be and is hereby decreed to be operative upon and restricted to the one undivided half of John M. Lee of the property acquired by him and Jule W. Parks at the succession sale, and be erased and canceled so far as it affects the other half owned by said Parks that the bank and Meyer Bros. furnish an account of the collaterals in their hands, to secure the debts due them by Lee & Parks, the collections thereon and the consequent credits on the said debts; that Meyer Bros. furnish a statement of the result of their attachment suit against said Lee & Parks and of the credit on their debt arising from said attachment, and that on proof to be made by the parties, the debts for which said two mortgage notes are held by the bank and said Meyer Bros. be fixed and the mortgage securing said two mortgage notes, and decreed operative only on one-half of the property, and be also restricted to the amount found to be due said bank and Meyer Bros., and for any residue of the notes held by plaintiffs and sued on herein left unsatisfied by the sale of the property acquired by said Lee & Parks at said succession sale, that plaintiffs have judgment against Madden, said judgment to be given in the present suit or in such other suit as plaintiffs may bring, and their right to institute suit against said Madden and his sureties is reversed, and it is further ordered that defendants pay costs.

ON APPLICATION FOR REHEARING.

On this application for the rehearing our attention is directed to that part of our decree condemning defendants to pay costs. The litigation is between the plaintiffs, and not the original

 Loan and Building Association vs. Church.

defendants, but the defendants in the rule to erase mortgages. Our judgment is against the defendants in the rule, not against the original defendants. We will therefore make our judgment more specific as to costs.

It is therefore ordered, adjudged and decreed that our former judgment be so amended as to direct, and accordingly it is now ordered and decreed that the defendants in the rule to erase mortgages, the Ouachita National Bank and Meyer Bros., pay the costs on that rule incurred in the lower court and on this appeal; in all other respects our former decree to remain unchanged, and to stand as rendered.

 No. 12,402.

 MUTUAL LOAN AND BUILDING ASSOCIATION VS. FIRST AFRICAN
BAPTIST CHURCH.

The failure to file a transcript within the time prescribed by law on an appeal regularly obtained and perfected, is equivalent to an abandonment of the same and warrants the dismissal of another and similar appeal subsequently obtained.
42 An. 475.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Henry P. Dart and Benj. W. Kernon for Plaintiff, Appellee.

Albert Voorhies and H. J. Rhodes for Paul Chapman, Third Opponent and Appellant.

Submitted on briefs February 1, 1897.

Opinion handed down February 15, 1897.

The opinion of the court was delivered by

MCENERY, J. This case was dismissed when before us at the last session. The transcript was not brought up on the return day, but before the expiration of the three days grace allowed by law an extension of time was granted within which to file the transcript. It was not filed within the time allowed by the extension. The appeal was, therefore, abandoned. Building and Loan Association vs.

49	880
52	1510
49	880
109	1080
49	880
116	44
49	880
1120	454

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Church, 49 An. 1458. The failure to file the transcript within the time prescribed by law is deemed an abandonment of the appeal, and a prohibition for a second appeal. The failure to file the transcript is the act of the appellant, and is equivalent to an abandonment of the same, and warrants the dismissal of another similar appeal subsequently obtained. Succession of Llula, 42 An. 475; Bienvenu vs. Factors and Traders Bank, 38 An. 210; Lausade vs. Maury, 31 An. 858; Ducournau vs. Levistones, 4 An. 30; Collins vs. Monticou, 9 An. 39; C. P. 594.

The appellant contends that having filed the transcript in the first appeal, the dismissal of the appeal does not deprive him of the right to a second appeal. But his transcript was filed too late—after the return day, and it was as though no appeal had been taken, and that it had been abandoned. Articles 587 *et seq.*, C. P.

The cases cited by appellant in support of his contention are all based on the case of Smith *et al.* vs. Vanhille, 11 La. 380. In that case it was held when the appellant had neglected to give a sufficient bond, or omitted any formality required by law, the appellee has the right to demand the dismissal of the appeal, but within the year the appellant can take a second appeal.

There is a marked difference between the failure to file the transcript in the time prescribed by law, and the irregularities noticed in the case referred to, and in the cases reported in 15 An. 116 (Dugas vs. Truxillo); 29 An. 702 (Succession of White).

The appellant having abandoned the appeal by not filing the transcript in time, and the fault being imputed to him, the appeal is dismissed.

No. 12,422.

49	881
49	885
49	886

STATE OF LOUISIANA EX REL. W. MORGAN GURLEY, SYNDIC, VS. HON. FRED. D. KING, JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

It is alleged that the law, which is the foundation of the proceedings complained of, is unconstitutional on the ground that it was not read in full in the Senate; and this ground is stated for preliminary writ of *mandamus*; but the original enrolled bill showing a contrary state of facts will not be made peremptory.

ON Application for Writs of *Mandamus* and Prohibition.

State ex rel. Syndic vs. Judge.

Ambrose Smith and John T. Whitaker for Relator.

Dinkelspiel & Hart for Respondents.

Submitted on briefs February 15, 1897.

Opinion handed down February 19, 1897.

The opinion of the court was delivered by

WATKINS, J. The relator's claim is, that he presented to the respondent a petition praying for the issuance of a writ of injunction in order to restrain a sale of certain mortgaged property under executory proceedings, for the reason, amongst others stated therein, that it was his "clear, ministerial and mandatory duty" to grant said writ and stay further sale proceedings; but that he refused to do so, and his refusal was a denial of justice and a deprivation of the relator's only adequate and effective remedy.

The judge returns that in the matter of *J. N. Augustin vs. Ernest V. Reiss*, No. 51,890 on the docket of his court—it being an executory proceeding in the foreclosure of a special mortgage—the relator was made a party defendant, under and in conformity with the provisions of Act No. 15 of 1894, and with whom the said proceedings were, thereafter, carried on contradictorily.

That during the pendency of these proceedings, there was presented by the relator a petition praying for an injunction to restrain the further execution of the order of seizure and sale, on the ground that said Act No. 15 of 1894 was not a valid law, but, on the contrary, an unconstitutional statute, and therefore null and void, because some of the formalities prescribed by the Constitution in its enactment had not been observed by the General Assembly; that is to say, that the bill, while it was a measure pending in the General Assembly, *was not read once in full in the Senate*.

The respondent further avers, that after a careful examination of the original bill which subsequently became Act No. 15 of 1894, as well as the original minute books of the House of Representatives and of the Senate—which were produced in the respondent's court, and are annexed to the record before us—he found the relator's complaint unfounded, as the bill appeared to have been regularly

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passed through "all the modes and tenses," required by the Constitution, and refused the injunction.

The respondent has annexed the petition of the relator for injunction and made same a part of his return.

The application of relator for relief by *mandamus* and prohibition is grounded upon the alleged unconstitutionality of the aforesaid law, and his contention is that the conclusion of the respondent was erroneous.

We are inclined to think that the relator has presented a proper case for the allowance of the preliminary writs and the restraining order, notwithstanding the ground assigned for relief by injunction is not exactly covered by the provisions of C. P. 739, nor of those of 298.

For if indeed there is no constitutional and valid law sanctioning executory proceedings against the syndic of an insolvent most serious consequences might result if they could not be arrested by injunction, as a third opposition without a writ of injunction might not prove an adequate and efficacious remedy for the creditors. A somewhat different case is here exhibited than that of an individual seeking relief from his own contractual liability.

But it does not appear from the respondent's return that the relator demanded a writ of injunction without bond under C. P. 785 and 740, and the relator's petition for injunction accompanying the return of the respondent's petition conditions his right to an injunction upon his giving bond.

In *State ex rel. Gaynor vs. Judge*, 38 An. 923, this court made a *mandamus* peremptory, compelling a District Judge to grant an injunction restraining a tax collector from collecting a tax under a law which was alleged to be unconstitutional and void.

Consequently we think *mandamus* a proper remedy under the circumstances.

But as all the *facts* are in the record and before us, so that the alleged unconstitutionality *vel non* of the law which is drawn in question here and which were before the respondent when he refused the injunction, we think it our duty to consider them in connection with the pleadings as a part of relator's case and decide that question in determining his right to relief.

Ordinarily, when the question of the constitutionality of the particular statute is determinable as a factor in the matter in litigation,

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such as the want of power in the General Assembly to pass the law, its determination would be, of necessity, relegated to a trial of the case on its merits, but the sole question in this case being that the bill was not read once in full in the Senate, a mere reference to the *enrolled bill* must settle the dispute.

The original enrolled bill discloses that it was introduced in the House of Representatives by Mr. Wynne Rogers, and filed on the 23d of May, 1894, bearing the number 148.

That on the day of its filing it was read by title. That it was read by title and referred to committee on judiciary on May 23, 1894. That it was reported with amendments on May 29, 1894.

That it was read a second time by title, amended and ordered engrossed and passed to third reading on June 1, 1894. That it was read a third time in full and roll called on final passage, and there being yeas 69 and nays 0, it was finally adopted and sent to the Senate on June 6, 1894. That it was received in the Senate on June 7, 1894. That it was read by title on June 8, 1894. That it was again read by title and referred to the judiciary committee on June 8, 1894. That it was reported favorably on June 12, 1894. That it was read by title and passed its third reading on June 13, 1894. That it was *read in full* and finally passed, yeas 28, nays 0, and title adopted and returned to the House on June 14, 1894.

The endorsements of the entries on the bill showing the proceedings in the House of Representatives are certified to by Peter J. Trezevant, clerk, and those in the Senate were signed by W. H. McClendon, secretary of the Senate.

The further endorsement on the bill shows that it was returned to the House of Representatives as having been concurred in by the Senate on June 15, 1894.

On this showing the charge of unconstitutionality of the law is not well grounded, and the refusal of the respondent to grant the relator's injunction was right and proper.

It is therefore ordered and decreed that the relief prayed for by the relator be denied, at his cost, and that our preliminary writ be set aside.

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No. 12,425.

STATE OF LOUISIANA EX REL. W. MORGAN GURLEY, SYNDIC, VS.
HON. N. H. RIGHTOR, JUDGE OF THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS.

ON APPLICATION for Writs of *Mandamus* and Prohibition.

Ambrose Smith and *John T. Whitaker* for Relator.

E. Howard McCaleb and *Dinkelspiel & Hart* for Respondents.

Submitted on briefs February 15, 1897.
Opinion handed down February 19, 1897.

The opinion of the court was delivered by

WATKINS, J. For the reasons assigned in the written opinion this day filed in *State ex rel. W. Morgan Gurley, Syndic, vs. Fred. D. King, Judge, ante*, p. 881, it is ordered and decreed that the preliminary writs of *mandamus* and prohibition be set aside, and that the relief prayed for by the relator be refused at his cost.

No. 12,426.

STATE OF LOUISIANA EX REL. W. MORGAN GURLEY, SYNDIC, VS.
HON. T. C. W. ELLIS, JUDGE OF THE CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS.

ON APPLICATION for Writs of *Mandamus* and Prohibition.

Ambrose Smith and *John T. Whitaker* for Relator.

E. Howard McCaleb and *Dinkelspiel & Hart* for Respondents.

Submitted on briefs February 15, 1897.
Opinion handed down February 19, 1897.

 Kern & Son vs. Creditors.

The opinion of the court was delivered by

WATKINS, J. For the reasons assigned in the written opinion this day filed in State *ex rel.* W. Morgan Gurley, Syndic, vs. Fred. D. King, Judge, *ante*, p. 881, it is ordered and decreed that the preliminary writs of *mandamus* and prohibition be set aside and that the rule prayed for by the testator be refused at his cost.

No. 12,215.

H. KERN & SON VS. THEIR CREDITORS.

The vendees, while consummating the sale and affecting payment of the price stipulated, as a condition, that they should be held harmless in case an attachment was sustained.

The agreement between the vendors and vendees covered all expenses incurred by the vendees in protecting their purchase, including attorney's fees.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. W. Howe and *W. S. Benedict* for A. Shwartz & Sons, Plaintiffs in Rule, Appellees.

Lazarus, Moore & Luce, Bernard Tiche, Dinkelspiel & Hart and *Percy Roberts*, for Syndic and Creditors, for Defendants in rule, Appellants.

Argued and submitted December 14, 1896.

Opinion handed down February 1, 1897.

Rehearing refused May 10, 1897.

The opinion of the court was delivered by

BREAUX, J. In this proceeding Shwartz & Sons sought to subject a fund (realized from a sale to them by Kern & Son) to the payment of counsel fees and all charges incurred by them as intervenors, to protect their purchase.

The salient facts are that a respite was granted to Kern & Son in 1897.

Instead of paying the first instalment to their creditors, when it

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became due, under the conditions of the respite, they made a surrender of their property.

Immediately before their surrender they sold their property, consisting of goods and merchandise, to A. Schwartz & Sons, for forty thousand dollars.

A short time after the agreement of sale had been made, Claffin & Co. secured a writ of attachment and levied upon the goods claimed to have been bought by Schwartz & Sons and sued out garnishment process upon these purchasers. These proceedings were instituted before the United States Circuit Court.

Shwartz & Sons, to protect their purchase, intervened. The controversy on all sides was quite energetic; many witnesses were examined and many law points argued, as made evident by the portly volume before us.

Finally, the Federal courts found, as a matter of fact and conclusion of law, that the attachment was dissolved by the insolvency and cession under the insolvent law of Louisiana.

In other words, it was found that in this State attachment gives rise to no lien prior to final judgment, and that after cession and acceptance all of the property of the insolvent debtor is vested in the creditors, and all suits brought anterior to the failure must be transferred to the court in which the insolvent debtor shall have presented his schedule, and shall be continued against his syndic.

The Federal court complied with the requirement of Sec. 975 of the United States Revised Statutes.

After the attachment had been dismissed before that court, and the State courts having cognizance of the case in insolvency, had become vested with jurisdiction, Shwartz & Sons secured a rule on the syndic to show cause why forty-one hundred and eighty dollars and twenty cents should not be paid to them.

They suggest, as grounds for their rule, that there appears on the schedule of the insolvents, Kern & Sons, the following entry, viz.: "The sum of eighteen thousand five hundred dollars is now in custody of certain custodians selected by my former attorney, Felix J. Dreyfous, and W. S. Benedict, the attorney of A. Shwartz & Sons, and which said sum of eighteen thousand five hundred dollars is held by them as trustees under an agreement made between petitioner and the said A. Shwartz & Sons, to await the result of a certain seizure and garnishment proceeding in the suit of H. B. Claffin Com-

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pany, agent, in the United States Circuit Court and entitled the H. B. Claflin Company vs. H. Kern & Sons, being No. 1269 of the docket of said court."

They also allege in their rule that the sum was held in trust by W. S. Benedict to protect them in their purchase.

That the amount of forty-five hundred dollars held by him as a reserve fund was held to abide the decree of the court. That they were obliged to expend and that they became liable for the sum of forty-one hundred and eighty dollars and twenty cents, to hold themselves harmless in their purchase of the stock of goods from Kern & Son as against the H. B. Claflin Company, attaching creditors.

"That the expenses consisted in attorney's fees paid to Howe & Prentiss, fifteen hundred dollars, and to Rouse & Grant, six hundred dollars, and due W. S. Benedict, one thousand dollars, and of actual costs of court paid in defending the purchase, the sum of one thousand and eighty dollars and twenty cents, viz.: to the clerk, marshal and stenographer, and printing briefs.

"That it was so agreed and understood verbally between H. Kern & Son and your movers that said purchase of said stock of goods being valid and advantageous to said H. Kern & Son, said Kern & Son would place sufficient funds in trust to protect your movers and hold them harmless against all losses or expenses by the litigation arising from the attachment and garnishment of the said H. B. Claflin."

The syndic pleads the general denial, and specially avers that the amount was withheld for the exclusive benefit and advantage of Schwartz & Sons, and solely in order to protect them against what they thought might result in a double liability, and that all of the court costs, attorney's fees and other charges were incurred by Schwartz & Sons for their sole and exclusive benefit, and in no wise enured to the benefit of Kern & Son or to their creditors.

The judgment of the District Court made the rule absolute.

One of the creditors of Kern & Son, and the syndic of the insolvency, prosecutes this appeal.

There is no dispute in regard to the value of the services. The record shows that the attorney for the appellant admitted, as follows: "No question is raised as against the amount of the charges, which are considered reasonable."

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In delivering the amount remaining of the purchase price the vendees stipulated that the syndic "shall hold the sum of forty-five hundred dollars, or allow the sum to remain in deposit in the judicial depository of the Civil District Court."

The syndic on his part, in consideration of the stipulations and by authority of the court, placed the amount in deposit in the judicial depository.

In support of the equity of their claim plaintiffs urged that but for their action the fund would have been taken by the Claflin Company, and that the syndic and creditors would not have received anything.

They moreover asserted, with reference to the particulars of their action, that they carried on an expensive litigation in the United States courts, in which the testimony of a large number of witnesses was taken in support of their motion to dissolve the attachment and defend their purchase; that the judgment of the United States Circuit Court was not satisfactory. They took a writ of error, and specially assigned as error the question of the attachment; that the burden of setting aside the attachment rested upon Schwartz & Sons; that they incurred and paid stenographers, counsel fees and other expenses, and thus saved the fund for the creditors of Kern & Son, which was held as security—first, to protect them against their expenses; and, in the second place, to go to the syndic for the creditors. The defendants in rule in their defence upon this question, controverting the argument of plaintiff, urge that no act of Schwartz & Sons prevented Claflin from realizing upon his judgment; that it was Kern's act; that it was his voluntary insolvency and the procurement by him upon his schedules, under oath, of the stay order of the District Court of the State, which the Federal Court held operated a dissolution of the Claflin writ.

That Schwartz & Co. could have relieved themselves of all responsibility in the litigation by depositing in the registry of the court the funds in their possession, or under their control; that in consequence there was no basis for the claim of Schwartz & Sons; that they continued with the litigation, in so far as they were concerned, to protect themselves from double liability and for the benefit of the creditors, and that it follows they should not recover their expenses.

With reference to the proposition that the services of the attorneys of Schwartz & Co., and the payment of costs enured to the benefit of the creditors of Kern & Son, we must say that, in our view, it is

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not a firm basis for an action. We are not led to infer from the facts of the case that the purpose of Shwartz & Sons, as intervenors in the case before the United States Circuit Court, was to save the funds for the creditors. However valuable the services of counsel may have been to the syndic, they were not employed by him; it follows, then, that those by whom they were employed can not recover fees paid from parties who did not employ them.

The question remaining for decision relates to the special deposit and special agreement, established, it is alleged, by the testimony of witnesses, and so found by the lower court.

The issue now before us presents chiefly questions of fact.

The declaration of Kern & Son contained in their schedule, verified by their oath, is positive and direct. In the presence of such a statement filed of record, Kern & Son either as parties to an action, or as witnesses, can not, with the possibility of its having any weight, deny that F. J. Dreyfous was their former attorney, and that he and W. S. Benedict were the trustees under an agreement between them and A. Shwartz & Co.

Mr. Benedict, a reputable member of the bar, whose integrity is not questioned, testified:

"Relative to the fund it was agreed between Mr. Dreyfous and myself that in order to protect A. Shwartz & Sons against any lawsuit, and to hold them harmless, and to indemnify them for any expenses they might have to undergo, that H. Kern & Son should protect the fund to that end, that it would be preserved for the benefit of the general mass of creditors of H. Kern & Son and that they would make a surrender in insolvency." Continuing as a witness, he said:

"I received on 2d May, 1892, this amount of twenty-seven thousand four hundred and fifteen dollars and fifty-six cents, to be held by me under trust that had been originally made as stated to protect A. Shwartz & Sons from danger of double liability in the premises, as expressed in the writing." Again, as a witness: "The primary object of the agreement was to hold this fund in trust to indemnify A. Shwartz & Sons from any risk by reason of any litigation on the part of Claflin & Co." We interpret the word *trust* as used, in the sense of agent deemed a trustee for this purpose mentioned.

It is evident in our judgment that there was an agreement entered

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into between Kern and Shwartz at the time, in regard to this fund, with the view of protecting the purchasers, Shwartz & Sons. Whether it includes the claim of plaintiff in rule is the question for our determination.

At this point, relative to the scope of the agreement asserted by the plaintiff in rule, the defendants insist that the declaration in the schedule of Kern & Son, which we have copied, was without foundation in fact, and that the testimony of Mr. Benedict was a mistake.

This petition, as we read the record, is not sustained by the weight of the testimony.

In the first place the attorney of Kern & Son, at the date of their sale to Shwartz & Sons, testified that he felt that the purchasers should be protected (from double liability possible, if Clafin & Co. succeeded in their suit), and that he effected an agreement to protect them; that he submitted the result of his action to his clients. They made no objection. The agreement was, he stated as a witness, that the sum of money should remain as a trust to secure A. Schwartz & Sons against the effect of the attachment, which was threatened by H. B. Clafin & Co.; to hold them harmless; to protect and indemnify them, as they were purchasers in good faith, and had paid their money. Nathan Shwartz, of the firm of Shwartz & Sons, testified that prior to the attachment Kern, of Kern & Son, promised them protection as purchasers and approved the action of his attorney, Dreyfous.

It is a fact that Kern, as a witness, flatly denied all to which these witnesses had testified. Confronted as he was by his own sworn declaration in his schedule, it could not be held that his testimony alone was of more weight than the testimony of at least three witnesses.

We have made a summary of the testimony bearing upon this point, as follows, viz.:

Nathan S. Shwartz testified that Kern assured him that his firm, as purchasers, "should be protected in every shape and form." He (Kern) raised no objection to placing money in trust, provided it met with the approval of his attorney, Dreyfous.

This is followed, as evidence, by the schedule of the insolvent, and lastly, in the action brought by the syndic against A. Shwartz & Sons for an accounting; it culminated in an agreement between the

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parties under which eighteen thousand seven hundred and ninety-four dollars and forty-six cents was turned over to the syndic; the sum of forty-five hundred dollars thereof to be placed in the judicial depository of the court to abide the decree on the issue to be presented by A. Schwartz & Sons for the costs and charges sustained, and for which they were liable in the proceedings of the Clafin Company in the United States Court.

The attorney for Kern & Son testified that with one who was authorized to represent Schwartz & Sons he agreed to withdraw the checks of the purchaser for the price and place it (the price) in the hands of some responsible person to be held as security against any law case to which Schwartz & Sons might have to answer.

H. Newgass testified that "under an agreement all around he handed the amount realized on the check to Isidore Newman. He informed the latter that it had been left with him as the trustee of Schwartz and Kern. After a special request Newman consented to receive the amount in trust. He was informed at the time that he would be called upon for it by Benedict, who had been selected as trustee. In the meantime (Newman testified that) he held it as a favor to Schwartz and to Kern, and that each must have known during the time that he held it; that he had the amount in his possession.

It is true, as alleged by appellants, the fund was not always in the possession of the trustees. For some reason it, at times, was in other hands. There was a statement filed by one of the trustees, Benedict, in the United States Circuit Court, in which it was not clearly set forth, it is contended, that the fund was to be charged with the amount now claimed, as will be seen by the following copied from the statement, viz.: "to protect A. Schwartz & Sons from the danger of double liability in the premises." This statement, however, explained by the testimony, included the expenses incurred as being in the nature of a double liability, from which they, (Schwartz & Son) sought to protect themselves. They had bought the property at its value; any liability arising in addition to the price was to that extent an additional amount.

The facts are indisputable that immediately after Schwartz & Sons had become the owners of the goods by purchase, for ample consideration, suit was brought by a creditor of his vendor (Kern) in which a large amount was claimed, an attachment was levied and the goods attached, and garnishment process issued for the price. It is shown

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that they were concerned, and called upon their attorney and said that they were anxious to annul the sale. Having been assured by him that they could be protected by the vendor from any loss, or any further liability of any kind, by placing the amount in deposit, an agreement was made to that end. It was complied with by all the parties. We think the fund paid by them was properly charged with the expense covered by the agreement.

We are next brought to the question (strongly argued by the counsel for appellant) of improper payment of a portion of the fund, owing, it is charged, to the control retained over it by Shwartz & Sons.

We have not found in our examination of the facts that Shwartz & Sons are responsible for the payment freely made, from this fund, while it was held in trust. The payments from the fund to several of the creditors of Kern & Son were made with their (Kern & Son) consent and upon their order. If any wrong was committed in paying from this fund, it was committed by Kern & Son.

Shwartz & Sons were in no way concerned in these payments. They had nothing to do with them. These payments should not operate to the prejudice of their right to recover under the agreement, even if there was some delay in paying the price or in providing for the payment of their check representing the price, owing to the fact that they were exposed to a double liability, in view of the pending attachment from which they desired to protect themselves.

An attentive consideration of the testimony has brought us to the conclusion that the fund was deposited as alleged for indemnity against possible loss.

The obligation was to save plaintiffs in rule harmless; this, we think, included fees and costs.

In *Berry vs. Slocomb*, 2 An. 993, the obligation by defendant was to save the plaintiff harmless, as in the case here; the court held that the defendant owed the plaintiff the fee paid by him to counsel by whom the case was defended.

We do not think, in view of the admission made of record, that we should pass upon the amount allowed for fees. There was no controversy as to the amount; the whole question was confined to the right *vel non* of Shwartz & Sons to recover the sum paid by them.

The judgment is affirmed.

MILLER, J., dissents.

ON APPLICATION FOR A REHEARING.

WATKINS, J. The object of this suit is to subject an asset in the hands of the syndic of the insolvents to reimbursement of certain attorneys' fees and other expenses which A. Schwartz & Sons incurred in a litigation with one of their creditors.

H. Kern & Son made sale of a stock of goods *in globo* to A. Schwartz & Sons for the cash price of forty-seven thousand dollars, and contemporaneously therewith H. B. Olafin & Co. sued out an attachment against H. Kern & Son for a large sum, in the United States Circuit Court, seized the stock of goods and issued garnishment process against A. Schwartz & Sons.

On account of these proceedings, A. Schwartz & Sons stopped the payment of the check which they had given to H. Kern & Son for the price of the goods, and at the same time they filed an intervention in the attachment suit claiming the ownership of the property.

During the pendency of the foregoing proceedings H. Kern & Son made a cession of their property under the insolvency laws of Louisiana, and included the proceeds of goods sold as one of their assets, and, as the result of the cession, the Federal tribunal held that the attachment was dissolved, thus freeing the fund from the garnishment and leaving the property in the possession of A. Schwartz & Sons.

The sale was thus consummated, and the price passed into the control of the syndic for the benefit of the creditors, and A. Schwartz & Sons proceeded by rule against the syndic for the fees and expenses which they had incurred in that litigation, resting their claims, mainly, upon a recital in the schedule of the insolvents, to the effect that said fund was in the possession and under the control of a certain trustee who had been selected by representatives of Kern & Son and Schwartz & Sons to await the result of the litigation, in pursuance of an agreement previously entered into between them for the purpose of protecting the sale.

In other words, that W. S. Benedict held the said fund as trustee for the purpose of protecting A. Schwartz & Sons in the expenses and expenditures they had incurred in their efforts to protect the stock of goods they had bought of H. Kern & Son, from the attachment of H. B. Olafin & Co.; and that this agreement was a supplement to and an incident of the sale.

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This claim is resisted by the syndic and one of the creditors of H. Kern & Son, who are appellants.

In support of their contention, A. Schwartz & Sons claim that they conducted an expensive litigation with H. B. Olafin & Co., and prosecuted a writ of error from an adverse judgment of the Circuit Court to the United States Court of Appeals, and therein procured the dissolution of the writ of attachment at great cost and expense.

On the other hand, the contention of the syndic is, that it was the cession of H. Kern & Son which struck down the attachment, and released the fund; and that A. Schwartz & Sons could, at any time, have exonerated themselves from all liability by surrendering the fund, or causing it to be deposited in the judicial depository of the court.

Our opinion holds that the services of the attorneys of A. Schwartz & Sons and the expenses they incurred having inured to the benefit of H. Kern & Son is not a good basis for an action.

But the action taken by A. Schwartz & Sons evidently prevented H. B. Olafin & Co. getting the fund in possession and depriving the syndic of it. The attachment was sustained in the Circuit Court; and nothing but the timely writ of error which was taken by A. Schwartz & Sons prevented its becoming a finality.

The agreement is stated to have been that the trustee was selected for the purpose of keeping the fund "in order to protect A. Schwartz & Sons against any lawsuit and to hold them harmless, and to indemnify them for any expenses they might have to undergo" * * * to the end, that the fund should be preserved for the benefit of the "general mass of the creditors of H. Kern & Son."

Our opinion, finding this proposition supported by the evidence, affirmed the judgment.

The application for a rehearing rests upon the following grounds, to-wit:

1. That the expenses incurred by A. Schwartz & Sons were the result of an understanding between them and Kern & Son, "to divert the proceeds" from the creditors of H. Kern & Son.
2. That the court erred in holding that the syndic and the creditors of H. Kern & Son were concluded and estopped by the schedule.
3. That if the statement made by W. S. Benedict, with regard to the agreement, is to be accepted, same must be taken in its entirety, and a part of it is that H. Kern & Son were to go into insolvency;

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and had that part of the agreement been carried out, the attachment would have been immediately dissolved.

4. That the court erred in holding that there was any trust or agreement whatever, for the purpose of reimbursing the expenses or the attorneys' fees of A. Shwartz & Sons.

5. That A. Shwartz & Sons could have, at any time, relieved themselves from liability by making a surrender of the fund.

There are several additional grounds of objection stated, but they are substantially embraced in the foregoing.

None of the grounds urged are at all serious. In our view a sufficient foundation for the agreement is the protection of the fund for the benefit of the syndic and the creditors of H. Kern & Son.

The cession of H. Kern & Son was made, but it was unavailing in so far as the insolvents were concerned. The attachment was levied immediately after the terms of the sale had been agreed upon, and before the check of A. Shwartz & Sons was presented at bank for payment. It was, of course, prior to the agreement. Consequently that part of the agreement, subsequently made in reference to the cession of H. Kern & Son, was of no possible efficacy; and the subsequent cession as made did not procure the release of the property. Hence the necessity of intervention and writ of error obtained by A. Shwartz & Sons, through which alone the release of the attachment was obtained.

The point made, as well as the agreement of counsel for the syndic and the creditor goes upon the theory that the cession of H. Kern & Son would of itself have solved the whole difficulty.

Counsel says that if Kern had surrendered immediately, there would have been no need of an agreement. And they ask: "In such case, how could it have ever been contemplated that there would be any litigation in the Federal court?"

This argument misplaces the situation altogether. The litigation began before the sale was consummated and Kern's cession, subsequently made, was unavailing without the aid of Shwartz & Sons. Without the agreement and Shwartz & Sons' assistance neither the syndic or the creditors would have realized anything out of the fund.

Rehearing refused.

MILLER, J., adheres to his dissent, and BLANCHARD, J., takes no part in this opinion, not having been a member of the court at the original hearing of the cause.

Amy vs. Berard.

No. 12,471.

CLARA AMY VS. ODILON BERARD.

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The law, which provides for a separation from bed and board in certain cases, is made for the relief of the oppressed party, not for interfering in quarrels where both spouses commit reciprocal excesses and outrages.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

Foster & Broussard and L. O. Hacker for Plaintiff, Appellant.

Thorpe & Muller and F. H. Thorpe for Defendant, Appellee.

Submitted on briefs April 14, 1897.

Opinion handed down April 26, 1897.

The opinion of the court was delivered by

BLANCHARD, J. This is one of those cases of marital infelicity whose grievances are, too frequently for the good of society, aired before the courts.

It is a case of crimination and recrimination—the wife against the husband, the husband against the wife—with the result of dragging forth from its closet the family skeleton and its exposure to the public gaze.

The wife sues the husband, claiming a divorce, and in the alternative, a separation from bed and board.

The causes alleged are excessive cruel treatment and his failure and refusal to provide for the family maintenance and support.

The husband enters a denial to this, and then, assuming the character of plaintiff in reconvention, charges against the wife ill usage, abuse, cruelty and bodily injury, and prays judgment against her for divorce, or, in the alternative, for a decree of separation from bed and board.

The evidence discloses a condition of affairs in this family that leaves no room for doubt that both spouses are equally blamable. Harsh treatment, habitual censure, denunciation, and even bodily violence are shown. The marriage obligations of reciprocal forbear-

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ance, patience and love—the taking “for better, for worse”—appear to have been disregarded by both alike.

The trial judge rejected the prayer of the wife and gave judgment for the husband on his reconventional demand, decreeing a separation from bed and board in his favor.

The reasons assigned are that “there is a preponderance of evidence in favor of defendant.”

The wife appeals.

It may be defendant has shown more of cruel treatment than did the plaintiff, or was able to produce more witnesses in support of his allegations. But that does not entitle him to a decree where the testimony shows his conduct to have been as culpable as hers.

Rather should the judgment have been one rejecting the demands of both and dismissing the suit. Such is the settled jurisprudence of the State. Mutual insults and outrages, the fruit of mutual provocation, unless there be a just and palpable disproportion of guilt as between the parties, furnish no sufficient ground of action to either. *Trowbridge vs. Carlin*, 12 An. 882; *Lallande vs. Jore*, 5 An. 33; *Naulet vs. Dubois*, 6 An. 403; *Castanedo vs. Fortier*, 34 An. 135.

We affirm the doctrine, announced in a very early case, that the law which provides for a separation from bed and board, in certain cases, is made for the relief of the oppressed party, not for interfering in quarrels where both parties commit reciprocal excesses and outrages. *Durand vs. Her Husband*, 4 M. 174.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be set aside, avoided and annulled, and that this suit be dismissed, costs of appeal to be borne by defendant and appellee, and those of the court below by plaintiff.

No. 12,408.

DUFOSSAT ET ALS. VS. FONTENOT ET ALS.; CALHOUN FLUKER, APPELLANT; J. L. LEBOURGEOIS, CITY OF NEW ORLEANS AND CHARLES M. GREENE, APPELLEES.

A third person, not a party to the original suit and judgment, has exactly the same standing as an appellant before this court as one of the parties thereto would have as an appellant.

A person who acquires title at a partition sale to effect a settlement between plaintiffs of their rights and interests in property in suit, takes their position and

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standing in the litigation, in point of fact, notwithstanding he fails to have himself made a party thereto—that is to say, his acquisition gives him no advantage, and does not affect the rights of the defendants and appellees.

A PPEAL from the Twenty-first Judicial District Court for the Parish of St. John the Baptist. *Rost, J.*

Calhoun Fluker and J. L. Bradford for Plaintiff, Appellant.

W. S. Benedict and Robert G. Dugué for Jos. L. LeBourgeois, Defendant, Appellee.

Argued and submitted March 3, 1897.

Opinion handed down April 26, 1897.

The opinion of the court was delivered by

WATKINS, J. The present litigation involves a tract of land, at this time situated in the parish of St. John the Baptist, having about eight arpents front on the Mississippi river on the left bank descending, and extending back a depth of forty arpents. It forms a part of a large tract of land extending from the Mississippi river back to Lake Maurepas and the Amite river, which is alleged to have been granted to Pierre Delile Dupard by the French government on the 3d of April, 1769. It passed from Dupard to his daughter, Madame Delile Macnamara, by inheritance, and she conveyed title to Henry Fontenot on the 17th of December, 1784.

By a will subsequently made by her in 1815, in Rouen, France, Mrs. Macnamara bequeathed her entire estate to Joseph Soniat Dufossat, Sr., at the time an officer in the French army—the bequest embracing the residue of the land covered by the aforesaid grant, and alleged to have been situated immediately in the rear of the tract which the testatrix had previously sold to Fontenot.

It is claimed that the aforesaid Dufossat died in 1835, having bequeathed his estate to his brother, Joseph Soniat Dufossat, Jr.; and that he sold to John McDonogh an undivided one-third of the land lying back of the first forty arpents, retaining the other two-thirds, of which he died possessed in 1865, leaving his estate by will to his numerous children.

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It appears that Joseph Soniat Dufossat, Jr., and John McDonogh brought a jactitation suit against six persons residing in the parish of St. John the Baptist, alleging civil possession of the back lands heretofore described, and located said suit in the then First District Court of the parish of Orleans—same having been filed in 1841.

McDonogh died in 1850, leaving his estate by will to the cities of New Orleans and Baltimore; and in the course of a partition subsequently made, the interest of McDonogh passed to New Orleans.

Subsequently the suit was removed to the parish of St. John under a change of the law, and upon the allegation that the interests of the six defendants had devolved upon Joseph LeBourgeois and Felix Becnel, residents of that parish.

It appears that after citations were issued and served, nothing further was done, and no further action was taken therein until about the year 1892, when the city of New Orleans filed an appearance, claiming one-third undivided interest, as having derived title by will from John McDonogh, and informing the court of the death of Dufossat, her co-plaintiff, and the residuary interests of his heirs; and further stating, upon information, that Joseph LeBourgeois, Sr., and Felix Becnel had died, and that their rights in the property in controversy, whatever they were, had devolved upon Joseph L. LeBourgeois, Jr., to whom the petitioner prayed citation to issue.

He was cited and filed a plea of prescription and made answer, setting up a claim of ownership to a part of the property in dispute.

In 1892 and 1893 some depositions of witnesses were taken on the part of the city of New Orleans, but the counsel of LeBourgeois objected thereto.

In this situation of affairs the city of New Orleans brought suit against the heirs of Dufossat for a partition of the lands involved in the suit above described, and obtained a decree of partition by licitation on the 24th of March, 1893.

An appeal from that judgment was prosecuted by LeBourgeois, which resulted in the dismissal thereof. *New Orleans vs. Dufossat*, 46 An. 399; *State ex rel. City vs. Judge*, 45 An. 950.

It is stated as part of the history of this litigation that Calhoun Fluker became the purchaser of the property at the partition sale, which was made on the 16th of June, 1894, and that by that adjudi-

cation he became invested with all the rights of the plaintiffs in the aforesaid suit.

It appears that the aforesaid cause of Dufossat vs. Fontenot was, on June 8, 1895, set for trial on the 20th of said month, on the motion of the defendant, LeBourgeois, and that said cause was taken up and tried on the day above specified, against the protest of the counsel of the plaintiff, who was absent attending the trial of another case in the parish of East Baton Rouge at the time.

That at the trial an exception of no cause of action was filed by counsel representing the defendants and overruled, and that the cause was taken up for trial upon the merits, and judgment was rendered and signed on that day in favor of the defendant, same being based upon a supplemental answer which was filed on the day of trial, and supported by many deeds, reports of land commissioners, acts of Congress, plans, maps and surveys, and supplemented by a great deal of parol testimony, forming a very large transcript.

The counsel for plaintiffs being absent they were unrepresented at the trial, and, consequently, there was no testimony adduced on their behalf, and Calhoun Fluker, to whom the land in controversy had been previously adjudicated, had not made himself a party to the litigation, and did not participate in the proceedings.

The judgment rendered is of the following tenor, viz.:

"It is therefore ordered, adjudged and decreed that there be judgment rejecting the demands of the plaintiffs, and dismissing their suit as to him, with costs, *i. e.*, Joseph L. LeBourgeois, Jr.

"It is further ordered, adjudged and decreed that the said Joseph L. LeBourgeois, Jr., be and he is hereby recognized as the true owner of the undivided one-half of the lands described in the plaintiff's petition" the description omitted—"and that he be quieted in his possession of said lands."

That judgment was signed on the 21st of June, 1895; and on the 3d of August, 1895, an action was instituted in the name of the city of New Orleans, for the avoidance of same, on various grounds, notwithstanding all of the rights of the city, as well as of the Dufossat heirs, had passed to Calhoun Fluker by the partition sale, to all appearances.

The grounds of nullity therein assigned are, substantially: (1) That the city's co-plaintiff, Dufossat, had died previously to the rendition of judgment and his heirs and legal representatives had not

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been made parties plaintiff; (2) that the fact that the Dufossat heirs had not made themselves parties, had been previously urged by defendants' counsel, at different times, as a reason why the case should not be fixed for trial; (3) that for the same reasons said counsel appeared at the partition sale and entered a written protest against it being made, and afterward took an appeal to this court for the same reason; (4) that on the 6th of June, 1895, the counsel of the city filed in the parish of East Baton Rouge a *mandamus* suit in which he was counsel for the relator against the Register of the State Land Office, and caused same to be fixed for trial on the 20th of June, 1895, the day upon which counsel for LeBourgeois, Jr., had, on the 3d of June, 1895, fixed the case of Dufossat vs. Fontenot for trial, though without notice to him; (5) that on said 20th of June, 1895, the cause was taken up for trial, and on the following day decided, notwithstanding the said attorney for the city had made due and timely objection and affidavit for a continuance thereof.

To the foregoing is added the general statement that said irregularities in the proceedings rendered the judgment void; and that the city had a good and valid title.

To the foregoing petition counsel for LeBourgeois filed exceptions (1) that as an application for a new trial it came too late, and (2) that as an independent action of nullity it could not be engrafted upon the former suit; and same were subsequently tried and sustained and the suit dismissed.

From that judgment no appeal was taken, and same may be treated and considered as having been acquiesced in. It bears date November 16, 1895.

In this condition that suit and judgment remained until the 11th of June, 1896, when the twelve months period during which same could be prosecuted, an appeal was taken by Calhoun Fluker, by petition and citation, as a third person having an interest in the property in litigation.

His petition is prefaced by the statement that on the 16th of June, 1894, he became the purchaser of the property in controversy at the aforesaid partition sale; and subsequently it recites at length the same grounds of complaint substantially as are stated in the aforesaid action of nullity on the part of the city alleging his possession and ownership thereof.

It is evident that the sole object of this appeal is to obtain a re-

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versal of the judgment rendered in favor of LeBourgeois on the 21st of June, 1895; and upon the sole grounds which were stated in the petition of the city in its action of nullity. But the position of the appellant is different from that of the city, for whose benefit that suit was covertly intended, in that he founds his right of appeal upon the title he acquired at the partition sale in 1894, one year previous to the trial, and the judgment from which his appeal is taken.

Upon that supposition, the rights, titles and interests of all the parties plaintiff had ceased altogether, and had passed by the adjudication at partition sale to the appellant; and the necessary deduction therefrom is, that neither the city nor the heirs of Dufossat were real parties plaintiff in the suit at the time of trial and judgment, nor in the action of nullity.

But, notwithstanding that was so, in point of fact, yet the appellant, as adjudicatee, for reasons of his own, had not caused himself to be made a party to the suit; and by his failing so to do he left it in the power of the defendants to proceed as they did, and take judgment accordingly—relying possibly on the fact that the effect of the partition sale was to divest the incapacitated minors of Dufossat, and to invest a person *sui juris* with title, against whom their judgment would be effective and valid.

But, conceding that the appellant has a standing in court as third person and party to the title, and the consequent right to urge the same irregularities and alleged illegalities in the proceedings that the city did; yet he can possess no other or greater rights, and they must, necessarily, be subordinated to the fact, that by the partition sale a party *sui juris* has been substituted in the place and stead of incapacitated persons in the title.

In this view of the matter, we are firmly of opinion that he is without any well grounded complaint.

It was plainly his duty to have caused himself to be made a party to the suit seasonably, so that his interest could have been protected therein; and that fact is illustrated by this appeal for the purpose of obtaining relief from the effect of the judgment therein rendered.

The defendant, Bourgeois, had a perfect right to have the cause set down for trial at his own risk. The city was at least a competent plaintiff with whom he could try the case contradictorily, and if, in

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point of fact, the partition sale had the legal effect of divesting the Dufossat minors, there was no necessity of their being joined as parties plaintiff at the trial—a capacitated person having taken their place.

We see no reason for disturbing the judgment.

Judgment affirmed.

No. 12,400.

EMANUEL J. BAYSSET VS. GEORGE M. HIRE.

The legal and moral duty due by the parent to his daughter, and the solicitude by which he should always be prompted for her future, give rise to a “qualified privilege,” on occasions, he thinks, his advice and admonition are required.

The tie between father and daughter, and the usual sympathy among the friends of both (to whom the report against the plaintiff who sought her hand was repeated) is such that the truth of the report was not the issue, but whether the father honestly believed it to be true.

The utterances of the father on such an occasion are not actionable merely because not true, but express malice must be shown.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Clegg & Quintero for Plaintiff, Appellant.

B. B. Howard for Defendant, Appellee.

Argued and submitted March 29, 1897.

Opinion handed down April 12, 1897.

Rehearing refused May 10, 1897.

The opinion of the court was delivered by

BREAUX, J. This suit was brought by the plaintiff to recover damages for slander committed, it is charged, by the defendant. The damages affected his reputation, caused loss in business, wounded his feelings and brought about a severance of the betrothal between himself and defendant's daughter, he, in substance, avers.

The defendant, in his answer, admitted that he had made the statement as alleged by the plaintiff, but he especially denied that the

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statement was made in any spirit of malice, revenge or hatred, or that it had, in any manner, damaged the plaintiff. He also averred that he entertained kindly feeling for the plaintiff; that he was paying his address to his daughter, to which he objected; that the statements he made were to friends of the plaintiff in confidence, without intending to injure him, but to convey to him that his visits must cease.

The case was tried before a jury. The verdict was for the defendant.

The vexatious and painful reports against the plaintiff, of which he complains, were of a date long anterior to the date that the defendant made the statements he is charged with having made.

Such reports, if unfounded, are always to be regretted, and those who maliciously and wantonly circulate them are as blamable and censurable as those by whom they were originated.

It remains that the case before us is exceptional. It is the cause of a father who sought to prevent his daughter from receiving the address of the plaintiff—in other words, the plaintiff sought defendant's daughter in marriage. The father, on account of injurious reports against the young man, deemed it proper to interfere.

It is true that rumor with her thousand tongues exaggerates everything. She rejoices in her task of telling alike of facts and fictions; of things done and things not done. Such reports as those circulated in this instance are nearly always disproved with great difficulty. The father owed no duty to the plaintiff, which could possibly prevent him from carrying out a determination prompted by affection and tenderness for his daughter. Reports, such as those made evident by the record, circulated about a caucasian of the purest type, would be enough to influence the conduct and utterances of a prudent parent when considering with the members of his family, or in conversation with close friends, the advisability of his daughter's marriage.

In justice to the plaintiff we deem it proper to state that witnesses of the highest respectability have testified that members of the family against whom the grievous charges were directed were at the time treated and considered as white, and that as such they were admitted in religious and other circles where none but white persons were admitted. It was plaintiff's misfortune that there were adverse reports about him. In view of the occasion and exigency, the ques-

Bayssett vs. Hire.

tion was whether the father, who is now the defendant, honestly believed the report to be true. In our judgment, whether the rumor was true or even whether the defendant had reasonable grounds to believe these reports, are not essentials to free him from the reproach of being a defamer, if he *believed* the report to be true.

In our view the occasion was one of qualified privilege, and the purpose of the defendant was to prevent a threatening injury, and not for the purpose of slandering. The disclosure made by him to the plaintiff was made *bona fide*, and the utterances while conversing with intimate friends do not disclose the least malice. We have before stated the occasion was one of qualified privilege. In that case, to sustain his action, the plaintiff must show actual malice. The *onus* is with him. We think the plaintiff has failed in his attempt to prove malice. Without this proof, if the defendant honestly believed the report true, he can not be held in damages.

We believe, as substantially urged by counsel for the plaintiff, that the pleadings on the part of the defendant were stronger than the occasion required. But the answer and the evidence were considered as a whole by us, and we reached the conclusion that the defendant in his defence had not alleged more than had been reported to him.

Mr. Cooley, in his book on Torts, said: "To require him at his peril to keep strictly within the limits of what he could prove to be true would be to make no allowance for the confidence properly belonging to the relation, or for the agitation and alarm which paternal feelings would naturally experience when an alliance believed to be improper was proposed. The case suggested is one of a large class of cases in which the like privilege is allowed, and in which it is necessary to show not only that the communication was false, but also that it was made with evil intent" (p. 214).

Much must be allowed to the thoughtful father who seeks to guide his children in the right direction. Unless he is reckless and inconsiderate in his statement his utterances are not actionable.

"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them, within any narrow limits." Baron Parke in *Toogood vs. Spying*, 4 Ty. and W. 582.

"The privilege is not defeated by the mere fact that the commu-

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nication is made in terms that were intemperate or excessive from over-excitement." 120 Mass. (Atwill vs. Mackintosh), pp. 177, 183; citing: 13 An. 239; 5 E. and B. 344; 5 An. 169.

It follows from the foregoing that communications within the qualified privilege are not actionable merely because they are false or defamatory, but express malice must be made evident.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,307.

LOUIS N. SCHOENFELD VS. LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

The decision in this case turns on an issue of fact whether the defendant was negligent in the transportation of plaintiff's horses; the court holds there was no negligence.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Joseph N. Wolfson (Dinkelspiel & Hart, of Counsel) for Plaintiff,
Appellant.

Denègre, Blair & Denègre for Defendant, Appellee.

Argued and submitted February 6, 1897.

Opinion handed down January 15, 1897.

Rehearing refused March 15, 1897.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues for damages on an alleged breach of a contract of defendant to convey thirteen race horses of plaintiff from Louisville to this city. The petition avers that by the negligence of defendant the horses reached here sick, that two died in consequence, and the others were so disabled as to be of no use. The petition claims ten thousand dollars for the two that died and five thousand for the expenses for veterinary surgeons, medicines and cure for the others. The defence denies the negligence charged,

and sets up a contract limiting the damages in the event there is any liability to plaintiff.

We find no occasion to deal with the defence based on defendant's contract, determining the damages, in the event of liability, as our conclusion is controlled by the view we take of the other defence.

A careful examination of the record in this case, in our view, does not exhibit any basis to charge the defendants. There were interruptions of the train in its course by which the transportation was delayed. The plaintiff in his testimony states that in making the contract four days was contemplated as the probable time required to reach here. The train left Tuesday and reached here Sunday morning. During the transportation the horses were in the car provided with the requisite arrangement for safe conveyance, in care, too, of defendant's agents and there is no suggestion of want of care or deficient accommodation. We can not attribute the sickness they developed to the detention, such as it was, on the trip. There was a collision a few miles from the city by which some of the horses were thrown down in the car. But as we read the record the horses sustained no bruises. The car itself sustained no injury except a hole above the horses. After the collision no complaint was made, apt to be the case if the horses had been injured. Other horses on the train exposed to the collision were uninjured. From the inception to the end of the transportation we can find no cause for the sickness of the others or death of two horses. One of the witnesses speaks of a lump in the throat of one of the horses, but we are unable to connect that trouble with the collision or with anything else on the car. Pneumonia is the malady the veterinary surgeon assigns as the cause of the death of the two that died. But even the expert testimony that pneumonia may be caused by confinement and impure air is hardly a basis on which we can rest any conclusion. The confinement was not much longer than that required, there is no complaint against the ventilating arrangement, and no reason to suppose any want of care expected and doubtless given by defendant's agents traveling with the horses. On this question of fact, we are constrained to hold that there is no liability of defendant established, and of this opinion was the lower court.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

State vs. Surety.

No. 12,455.

STATE OF LOUISIANA vs. J. C. RUTHING, E. E. ROBERTS, SURETY
ON BAIL BOND, APPELLANT.

The bond given by the accused was forfeited. The sureties appealed to have the order of forfeiture vacated.

The accused bound himself to appear in court to answer, and he also bound himself not to depart without leave of the court.

He having departed without leave, properly, the bond was forfeited.

Although the indictment may be defective, and the offence not sufficiently set forth in the bond, the sureties are held to have known that they were signing a bond for the appearance of the accused.

The validity of the indictment can not be assailed while the accused is a fugitive. The sureties must have their principal to answer to the sentence. His departure, prior to sentence, without leave, is a breach of the bond.

A PPEAL from the Second Judicial District Court for the Parish of
Webster. *Watkins, J.*

M. J. Cunningham, Attorney General, *A. J. Murff*, District Attorney
(*P. A. Simmons, Jr.*, of Counsel), for Plaintiff, Appellee.

L. K. Watkins for Roberts, Defendant, Appellant.

Argued and submitted April 3, 1897.

Opinion handed down April 26, 1897.

Rehearing refused May 31, 1897.

The opinion of the court was delivered by
BREAUX, J. The surety on a bail bond appeals from a judgment rendered on the forfeiture of the bond.

The bond recited that the accused was held to answer to the charge of "extortion by threat."

The condition of the bond was to answer the charge brought against him, and not to depart from the court without leave.

He was indicted under Act 63 of 1884, which defines the crime for which he was indicted.

After the witness had been examined and argument of counsel heard, it was late at night; the court instructed the jury that they might return a sealed verdict to the clerk, in the absence of the

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court, and thereafter separate until the next day. The jury having agreed on a verdict during the night and having had it filed in accordance with instructions, when they appeared in the morning to have their verdict read and recorded the accused was absent.

He was called and failed to appear; thereupon his bond was forfeited and judgment was rendered against the surety, who is the appellant here.

The errors complained of on appeal are:

1. The bond did not define any offence denounced by statute.
2. Act 63 of 1884 is in violation of the Constitution of the State
3. The only bond required, after the indictment has been found, is one conditioned for the appearance of the accused for trial, and that the accused had complied with the condition.

The appellant with reference to the first ground concedes that an appearance bond need not, prior to indictment, technically define the offence charged, but contends (after an indictment is found against the accused) that a bond for his appearance to be legal, must define the offence charged in the indictment.

In our view in this particular very little difference is to be made between a bond given prior to the indictment of an accused or a bond given after he has been indicted. In either case the recognizance need not set out the offence charged with the technical accuracy prescribed in an indictment. Archibold, Vol. 1, p. 196. It follows that a recognizance not containing a description of the offence, strictly as stated in the statute, may be good.

"The reasons that impel courts to require strict conformity to statutory or general rules for the structure of indictments, and for the description of crime therein, do not apply to bonds executed to enable accused persons to liberate themselves from imprisonment." State vs. Tennant, 30 An. 853.

There were several conditions inserted in the bond, to which the accused and his sureties must be held. One of these conditions was that the accused would not depart from the court without leave.

It was express that the accused should not leave before his discharge by the court. By departing as he did we think that he has violated one of the principal obligations of the bond. State vs. Ridding, 8 An. 79.

In a case relied on by the appellant it was held the bond would have been sufficient if it had contained the condition not to depart

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from the court without leave first obtained, thereby affirming the view expressed in this and the other decisions cited. *State vs. Forno*, 14 An. 450.

"The condition was also that the accused should not depart without leave of the court, and having violated this condition of the bond he and his sureties are equally bound." *State vs. Ansley*, 13 An. 299.

In *State vs. Cole and Williams*, 12 An. 472, this court said:

"It is sufficient answer to this objection that the accused bound himself not only to appear at court to answer that specific charge, but also not to depart thence without leave of the court first obtained. Having departed without leave his bond was justly forfeited." Citing: 1 Chitty's Criminal Law, p. 105.

This rule was expressly stated and reaffirmed in *State vs. Tenant*.

In another jurisdiction the bond omitted to stipulate that the accused should answer the accusation against him, but it contained the condition that he should remain in court from day to day until discharged; it was held the omission did not impair the validity of the bond. *Gray vs. State*, 11 Texas App. 527.

When one enters into the obligation of suretyship for the appearance of a person charged with crime, the obligation is in character, civil. *State vs. Ashley*, 13 An. 299.

Here the most important condition was the presence of the accused.

The delivery of an accused to his sureties is conditioned upon their together signing the required bond. The principal feature of the bond, and that which it is intended to secure, is his presence in court. Besides, in this case, the endorsement on the bond and the whole record showed the nature and character of the offence with which the accused was charged. The number on the face of the indictment and on the face of the bond is the same. It follows that the sureties must be held to have known that they were signing a bond for his appearance to answer to an offence charged, although not correctly described in the bond.

We will conclude upon this point by referring to the case of *State vs. Porter*, 63 Missouri, 522, in which the court said that the bond was binding; that in the *People vs. Stager* (10 Wend. 431) it was held that the clause "not to depart until discharged," is unnecessary

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in respect to the charge, which is the basis of the recognizance; that its use is to detain the accused on other charges that may be preferred against him. A similar view of the ends to be accomplished in such a cause in a recognizance is taken in earlier books, citing Hawk. Pl. Cr., Ch. 15, No. 84.

It is next contended by the defendant that the condition of the bond, "that the accused shall not depart without leave of the court," was not authorized by the statute; that Revised Statutes, Secs. 1088 and 1910, contain no such requirement. May it not be said in answer that one who becomes security on a bond required by law, to which he has voluntarily submitted himself, is bound by the obligation he has assumed. The conditions inserted "for the appearance of the accused," Sec. 1010, 8d paragraph, covers, when expressed in the bond, the condition that he shall not depart without the court's leave.

This brings us to a consideration of the defence that Art. 63 of 1884 is unconstitutional.

Act 64 has been by this court decided unconstitutional, *ergo* Act 63 of 1884 should be, for the same reason, decided unconstitutional, is the position of the appellant.

The security on the bond takes the fortune of his principal, and is bound equally with him. A fugitive from justice, principal on the bond for his appearance in answer to an indictment, can not object that the law under which he was indicted was unconstitutional. The plea in his behalf can only be made in his presence. The bail, no more than the principal, has the right to invoke the unconstitutionality of the law, while the latter is an absconder. If the bond is illegal, upon the ground of the unconstitutionality of the law, it follows that the indictment is illegal. The accused would indirectly accomplish that which it was impossible for him to accomplish directly, and this by a plea of his security, in whose friendly custody he is, in law, supposed to continue after he has obtained his release on the bond.

Lastly, it is contended by the appellant that the judgment of forfeiture should be vacated, because the accused appeared, was put on trial and convicted.

Here, again, the surety is met by the condition inserted in the bond that his principal was not to depart without leave of the court.

The principal was not formally surrendered. He was tried, but

left before the jury had returned the verdict in open court. The bail was not discharged by the fact that the principal was put on his trial. This was clearly decided in the case of *State vs. Norment*, 12 La. 511.

The court said in that case: "The accused did accordingly appear, but departed thereafter without leave of the court, whereby the condition of the bond was broken and the forfeiture incurred."

In *State vs. Martel et als.*, 3 R. 23, Judge Martin, for the court, said: "The condition of the bond is that the principal shall appear at the court, and shall not depart the said court without leave thereof. The breach of the recognizance is his departure without leave of the court."

Believing the decisions in these cases to be correct, we are not disposed to overrule them.

They have the support of decisions in other jurisdictions; thus, in the case of *Alexander et al. vs. Georgia*, Kelly's R., p. 139, the court held, in a case, the facts being substantially similar: "The sureties must have their principal to answer to the sentence of the court."

After a complete review of the issues, we have found no ground upon which the surety can be relieved.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 12,383.

HEIRS OF AMERON LEDOUX VS. LEON LAVEDAN ET ALS.; HEIRS OF AMERON LEDOUX VS. LAURA R. HYAMS, ADMINISTRATRIX, ET ALS.; GEORGE W. LEWIS, INTERVENOR (CONSOLIDATED).

The plaintiff brought the action to compel delivery of property to the succession of which he was a creditor; in this action another creditor joined as an intervenor.

1. *Defence as to Intervenor*—The plea of *res judicata* was pleaded in bar to the action.
2. *Jurisdiction*—The intervenor contended, in opposition to that plea, that the probate court was without jurisdiction to compel the administrator to deliver property, of which, he claimed, he was personally the owner.
3. *Bound by the Proceedings (Intervenor)*—She was plaintiff in the action in which the judgment, claimed as *res judicata*, was rendered. It was intervenor's action which brought title to real estate into question.

Ex Necessitate Rei—The court had jurisdiction. Succession of Bellande, 41 An. 498.

4. *Title of Administrator*—The intervenor was concluded by the judgment, which decreed contradictorily with her that the succession, whose right she championed as a creditor, had no title.

49	913
52	313
52	384
49	913
124	1002

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5. *Not a Bar to Plaintiffs (Res Judicata)*—The plea of *res judicata* does not apply, as against the claim made by the plaintiffs, for the reason the administrator did not represent the succession.
6. *Not a Judicial Mandatory*—(a) The administrator had an adverse interest, and was not, in consequence, the judicial mandatory of the creditors in the suit in which he obtained a judgment decreeing that he was the owner. His heirs and those holding under them have no right to the property on the plea of *res judicata*.
7. *Creditor's Interest*—(b) The creditor, by whom suit was brought against the administrator personally, represented her own interest, and not the other creditors of the succession. The judgment rendered against her, on her opposition remaining (after the provisional account had been homologated in so far as not opposed), is not *res judicata* as against the other creditors of the succession, who did not join in the opposition to compel the administrator to deliver property.
8. *Proceedings not in Concurso*—(c) The fact that the creditors were carried, as to their claim, on the provisional account did not render them subject to the plea of *res judicata* in the matter of a judgment procured by one of the creditors against the administrator personally; the creditors against whom the plea is pleaded were not present; were not notified and took no part in the proceeding, which resulted in a judgment pleaded as *res judicata*.

ON APPLICATION FOR REHEARING.

The issue was decided in favor of plaintiffs, appellants; appellees are bound for costs of plaintiff's appeal.

The court when passing upon the question of *res judicata* is necessarily restricted to the issue which has been determined by the judgment pleaded as *res judicata*

A PPEAL from the Civil District Court for the Parish of Orleans.
 Théard, J.

Frank L. Richardson and Frank Soulé for Plaintiffs, Appellants.

Jerome Meunier for J. P. Dupont, Defendant, Appellee.

Benjamin Ory for Leon Lavedan, Defendant, Appellee.

Fergus Kernan for Laura R. Hyams, Administratrix, Defendant and Appellant.

T. O. Stark for Dr. Geo. W. Lewis, Intervenor, Appellant.

Argued and submitted March 17, 1897.

Opinion handed down April 26, 1897.

Decree modified and rehearing refused May 31, 1897.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs are the heirs of the late Ameron Ledoux, who was a creditor of the succession of the late Henry M. Hyams, evidenced by a judgment rendered in 1866 and kept alive at all times since, it is alleged.

They brought this action against the defendants for a judgment decreeing that the property described in their petition is owned by the successions of the late Henry M. Hyams and wife, who died insolvent, it is averred. Plaintiffs in their petition claim that it should be sold as succession property and that the proceeds should be applied to the payment of creditors upon an account to be filed.

The petitioners alleged that the lifetime interest in the property had been confiscated by the United States Government and sold.

Subsequently, the late H. M. Hyams was pardoned by the proclamation of General Amnesty, issued by the President of the United States, and restored to his rights.

He and his wife died in 1875.

In 1877, in due course of administration of their successions, the administrator filed a provisional account of his administration.

Among the names of creditors carried upon the account were those of the father of plaintiff, Ameron Ledoux, of Mrs. Camille Lewis, and of the Planter's Bank.

The former Ameron Ledoux did not oppose the account. Oppositions were filed by Mrs. Camille Lewis and by the Planter's Bank.

They alleged that there appeared to have been sold by H. M. Hyams, deceased, to I. S. Hyams, his son, property described in the petition. They charged that the sale was simulated.

They also alleged that there were other properties which I. S. Hyams ostensibly purchased for himself, but which really belonged to the succession; because they were made in the vendee's name for the use and benefit of H. M. Hyams, who furnished the funds, and because the vendors in these sales (vendors to I. S. Hyams) had themselves only purchased the life interest or usufruct of the property at the confiscation sales made by the United States Marshal; that the vendors to I. S. Hyams only sold the right which they had purchased (viz.: the life interest), and that although the late H. M. Hyams intervened and became a party to the sales, he could not thereby satisfy or confirm these sales to I. S. Hyams, so as to convey to the latter an absolute and enduring ownership in the property.

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That by the death of H. M. Hyams the life interest or usufruct in the property had become extinguished and the ownership reverted to his succession, subject to the rights of its creditors.

The moneyed demand of this opponent, Mrs. Camille Lewis, was merged into a judgment in her favor, in 1866.

The account was homologated in 1877, so far as not opposed. In 1878, judgment was rendered on the opposition, sustaining them, for the property covered by the simulated act of sale (or rather sales the judge of the lower court decided were simulated) and he dismissed the oppositions, as to the remainder.

In his reasons for judgment the judge of the Second District Court, a court of probates, at the time held that by the condemnation and sale of the property, all interest of the late Henry M. Hyams "was divested, and that the purchase by I. S. Hyams from the purchasers at the confiscation sale did not vest the fee simple in I. S. Hyams; that the vendors to Hyams (adjudicatees of the government) could not give title transferring the property in ownership, but that at the death of H. M. Hyams his children took these properties which were once his by virtue of the statute and express reservation in the Federal Constitution, and that they could not be brought into his succession, through whom they did not descend to his heirs; that the property may be burdened with the debts of Hyams, Sr., contracted before their confiscation and sale, a question he (the judge *a quo*) stated he was not called upon to determine. If they are," added the court, "this is not the *forum* in which opponents can exercise the rights which they have. They must go before courts of ordinary jurisdiction."

Plaintiffs in the case before us, for our determination, in their petition, allege that the properties which they claim should be sold to pay creditors of the succession were sold under the confiscation act as the property of H. M. Hyams, and that under the amnesty proclamation they reverted to him, and by his death to his succession, and not to the heirs directly, as erroneously decided by the judgment rendered in 1878.

George W. Lewis, transferee of Mrs. Camille Lewis, intervened and reiterated the allegations of plaintiffs.

The defendants filed the plea of *res judicata*; the judgment upon this plea was for the defendants Lavedan *et al.*

The plaintiffs and the intervenor prosecute this appeal.

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There is disagreement among counsel as to what property is involved in this litigation. No deed containing description of property has been introduced in evidence, and no attempt at identification of property by evidence was made..

All the property designated as property of the first class is not clearly identified.

The same is true of the property designated as property of the second class—i. e., the property which had been confiscated does not appear to have been segregated from the property which was not confiscated. The difference as to the two, as to title, was a subject of argument at bar.

We have seen that the judgment rendered in 1878 decreed the first—the property of the first class—property of the succession and dismissed the opposition as to the property of the second class.

With the evidence before us and in view of the allegation made in the pleadings, we can not determine with any degree of accuracy what property is included in the first class and what property is in the second class. We will, notwithstanding, pass upon the issue of law involved.

SHE TRIED THE RIGHT WITH THE ADMINISTRATOR AND LOST.

The transferrer of the intervenor provoked the judgment which (he) the intervenor now contends was rendered by a court without jurisdiction. In the first case as in the second, the purpose of the suit was to compel the administrator to include the confiscated property among the assets of the successions of H. M. Hyams and wife.

She (Mrs. Camille Lewis) partially succeeded; the court ordered the ostensible owner, I. M. Hyams, to deliver to the succession property held; it was decreed, under a simulated title. In matter of the dismissed opposition, no appeal was taken. She (plaintiff in the first suit) acquiesced in the judgment. We think, after having given careful attention to the grounds urged in the suit before us, that the Probate Court had jurisdiction to pass upon an issue raised by this opponent in the first case, pleaded here as *res judicata*. It was her action which brought the title to real estate in question. The Court of Probate was competent to decide a question of title to real estate when title to real estate was an issue directly made.

Mrs. Camille Lewis had authority to stand in judgment. She is concluded by the judgment rendered at her instance. It were

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unreasonable to hold that one as creditor may sue to compel an heir to deliver property to a succession, but that the heir is not bound by the result in case of failure in maintaining the action; that she may bring another action to compel the same heir to surrender the property to which in the former case the court determined the succession had no right as owner. It is too late in our opinion for the intervenor to raise questions at variance with a decree procured by the intervenor's author many years ago. The thing demanded was unquestionably the same, and it was founded on the same cause of action; this constitutes the thing adjudged.

The issues involved were considered and determined, and the judgment was definitive against the intervenor as to a portion of the property. *Granger vs. Singleton*, 82 An. 900.

The successions were insolvent. The purpose was to determine the amount to which each creditor was entitled from the sales of the property.

It is true the proceedings were probate in character. But the Court of Probates was competent to decide questions of title where real estate was brought in question. Act of 1848, No. 71.

The intervenor pleaded title in the succession to the whole property. Her plea having been sustained in part, she is concluded as to the remainder, to which it was held the succession had no right in course of the settlement of these successions.

In *Morton vs. Packwood*, 8 An. 167, this court held that an executor could maintain his personal right to property for which the heirs sought to compel him to account, and that the judgment recognizing him as owner constituted *res judicata*; his personal rights were asserted and determined upon. It was adjudged by the Court of Probates that he was the owner. "No question," said the court, "having been made as to the jurisdiction of the court, we think there is no difference in principle between a litigation in this form and a judgment for a sum of money, and the title to, or interest in, real property, where the parties select this mode of determining it."

It has also been decided by this court that it matters "not under what form the question is presented, whenever the same question recurs between the same parties, *res judicata* operates as a bar.

Judge Porter, of a similar issue, speaking for the court, said:

"A judgment between two creditors on such opposition would not perhaps form *res judicata* except as between them." *Saul vs. His*

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Creditors, 7 N. S. 483. An authority, which applies here both to the intervenor and to the plaintiffs, to that latter it applies, and supports the view that they are not concluded by the judgment.

The intervenor in the second place contends that the dismissal of the opposition, as dismissed in the judgment pleaded as *res judicata*, reserved to Mrs. Lewis from whom he holds the rights of resorting to another jurisdiction. The defence as to that plea is based upon the "reasons for judgment," and not upon the decree, which is absolute, and contains no reservation.

But granted, that these "reasons" should be considered in passing upon the question of *res judicata*.

It nowhere appears that a reservation was made against the successions; as to these it was expressly decided that the properties were not part of their assets. Whatever was reserved, as we read the reasons for judgment, related to those persons (and the heirs who received title from them), who, possibly, the court held, had become purchasers of the property, *cum onere*.

THE JUDGMENT PLEADED AS RES JUDICATA MADE NO RESERVATION
AS TO THE SUCCESSION OF H. M. HYAMS.

In conclusion, as to the intervenor: we do not understand as contended by her counsel, that the judge declared that he was incompetent to entertain the demand, or that he decided upon a point which he disclaimed the competency to decide. As against the successions upon the issues presented, he decided, in matter of their settlement, that they were not entitled to the property. As against third persons, if the creditors had claims he determined that the proceeding should be against them in a court of another jurisdiction and not against a succession in a court of probate jurisdiction.

CASE OF PLAINTIFF.

The plaintiffs, in the first place, urged that they were not concluded by the plea of *res judicata* for the reason that, different from the position of the intervenor, their ancestor from whom they inherited was not a party to the opposition.

We have divided the question at issue as follows, viz.:

1. Whether the administrator represented the creditors in the suit which resulted in his favor.
2. Whether the creditor, Mrs. Lewis, by whom the suit was brought

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against the administrator, represented her interest only, or that of all the creditors of the succession.

3. Whether the creditors were estopped by the proceedings, between the suing creditor and the administrator; by the fact that they were parties to the provisional account which had been homologated, so far as not opposed, at the date that the judgment was rendered upon the opposition of Mrs. Camille Lewis *et al.*

THE ADMINISTRATOR WAS NOT THE REPRESENTATIVE OF THE
CREDITORS.

Taking up the first proposition, we think that it would be going out of fixed limits to hold that the administrator represented the heirs and creditors in an action to compel him to deliver property to which he claims title. The administrator in such an action, which involved his personal interest, represented himself only.

The succession has no legal defender in so far as he is concerned. He can not be both plaintiff and defendant in a suit. An administrator, in that case, must plead for his account, and not for account of the heirs and creditors.

We must keep in view that to sustain the plea of *res judicata* there must be absence of doubt and the presence of certainty.

How can the proof of *res judicata* be clear, certain and convincing, as required, where the administrator is the defendant, claiming the property in controversy as his?

After having personally succeeded in his demand against a creditor, who chose to sue him, he or his heirs can not sustain the position that he was the legal representative of all the other creditors; against whose interest he sustained his defence against the suing creditor.

One can not be a plaintiff and defendant in matter of a succession of which he is the administrator. Harris vs. Pickett, 37 An. 746; Thomas vs. Bienvenue, 35 An. 987.

If the administrator were living and offering to defend his title on the ground of *res judicata*, he could not properly be heard.

The position of owner and agent would be incompatible. The administrator instead of representing the creditors is their adversary. He is openly opposed to them.

In so far as relates to that plea his heirs and those who hold under them are not in a better position.

A judgment rendered between the creditor and the administrator, the latter an interested party, is not res judicata against other creditors.

This brings us to the question of the extent that one creditor binds the others, in an action by him against the administrator to compel him to deliver to the succession property of which he claims he is the owner.

Of course a creditor of an insolvent succession whose claim is unquestioned can compel the administrator to deliver property of the succession he withholds. *Neda vs. Fontenot*, 2 An. 782; *Macarty vs. Bond et al.*, 9 La. 355.

The right of the creditor to the remedy just stated is not denied in this case. We refer to his remedy in order to state more clearly our views as to the effect, *vel non*, its exercise has upon the rights of other creditors. The creditor, we are of opinion, can not represent the succession further than it is actually necessary for him, in his own interest, to represent it, in order to maintain his own action. He can not, by separate or combined action with other creditors, fix responsibilities or offset the rights of creditors who, after the administrator's account, in so far as not opposed, is homologated, choose to remain silent and accept the account as homologated.

The creditor pleaded for his account and not as a judicial agent for the benefit of all the creditors. He can not as relates to other creditors engraft upon an administrator's provisional account a separate litigation against the administrator in his individual capacity and obtain a judgment which will operate as a bar to the claims of other creditors.

The heirs, like the creditor, can sue to have property delivered to the succession, from which he inherits. His remedy being similar the effect as relates to *res judicata vel non* must be the same.

Regarding heirs, in our researches upon the subject, we have found in Moreau and Carleton's translation of the *Partidas*, Vol. 1, page 287, a principle of law clearly expressed: If one of the heirs of a debtor be sued and the plaintiff establish his claim by proving his debt to be due from the deceased, and thereupon judgment be rendered against the heir, such judgment shall not prejudice the other heirs, though given with their knowledge, and without any opposition upon their part; the same is the case where one of the heirs of the creditor instituted a suit for a debt due the deceased, with the knowledge of the other heirs, and without their making any opposi-

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tion to it, for though the plaintiff be cast, the judgment against him shall not prejudice the other heirs.

We think the foregoing rule is correct; it follows, that the judgment between the creditor and the administrator personally was *res judicata*, but as to the other creditors it was *res inter alios judicata*. We conclude upon this point with the statement: creditors are not represented by a creditor who has brought an action to compel an administrator personally to deliver property to the succession, of which the administrator claims title as owner.

ISSUE NOT DECIDED IN CONCURSO.

We are brought to the last ground upon this branch of the case.

Were all the parties plaintiff and defendant in the matter of the questions presented and decided contradictorily between the opponents in the account filed in 1878, and the administrator personally?

Unquestionably the rule applies where there is opposition to an account and the tableau proposes a distribution of funds on hand. There arises as to the funds to be distributed in that case a *concurso* among the creditors.

The possibility *vel non* under our jurisprudence of extending that rule so as to apply it to the creditors where one of their number has brought suit against the administrator to compel him to deliver property as before stated, is the difficult question before us for determination.

At the date that the judgment pleaded as *res judicata* was rendered, the provisional account had been homologated, so far as not opposed, and the creditors who were not opponents had virtually accepted the account as correct. They did not join in the opposition.

The creditors who continued opponents after the judgment of homologation had been rendered primarily sought their own interest. They pursued their action, and not an action of all the creditors.

In their answer (for an opposition corresponds to the answer in the ordinary procedure) they combined the two; an action in character petitory, and an action in opposition to the account. May it not be if the creditor represents all the creditors, as contended by defendants, that it would frequently operate as a hardship in the settlement of insolvent successions, if the creditor could sue the administrator personally; combine with him and illegally impose an

onerous charge upon the estate. It does appear to us that the creditor, neither by separate nor combined action, is authorized to fix responsibilities upon the other creditors in cases in which he is authorized to sue because of his personal interest.

We have here discussed the proposition entirely in the abstract.

The creditors who procured a decree to compel the administrator to deliver the property only sought a legal right. The possible measure and abuse of the remedy, if defendant's theory were adopted, is referred to only by way of illustration.

We add further on this point: Creditors not suing are not parties; for parties are those who have the right to control the proceeding, nor are they bound as interested persons, for they were treated as third persons. It is not shown that they were notified or that they were present at the trial, personally or by counsel, or that they had the least knowledge of the action.

The creditor suing for property for the succession acts in aid of the administrator who has possession for all the creditors. Ordinarily a suit by a creditor lies to compel a defendant to deliver to the administrator property alleged to belong to the succession. There must be a succession representative in such a case. *Neda vs. Fontenot*, 2 An. 784.

Here there was none; the administrator, the court decided, was personally the owner. He was an adverse party, and as such incapable of acquiring rights against those by whom he was not sued.

It was also urged by defendant's counsel in support of the plea of *res judicata* that the succession had received a portion of the property claimed by the creditor, who is the intervenor here. That may be, but we have not found evidence of it of record.

It does not appear that the property was delivered to the succession; that it was sold and the proceeds distributed.

It is well settled; to constitute *res judicata* the issues decided must be clear, definite, certain; there must be absence of doubt. In this case there was absence of needful certainty, and we were therefore compelled to overrule the plea.

We limited our decree to the plea of *res judicata* proper.

The case of *Vincent vs. Phillips*, Tutrix, 48 An. 352, 356, was cited at bar, in which the court said: "Whether it be strictly and technically *res judicata* or not the prior case must be taken to have settled the law of the case."

Here, the case not being entirely similar, we decide "strictly and technically" that the plea was not sustained by the judgment pleaded. We leave all other questions open for future determination. Passing from the subject in hand we will state that the last cited case is unlike the case here in that in the former the creditor sued the legal representative of the succession who had possession for the creditors and no adverse interest. She was not claiming property, and was not decreed the owner of the property claimed by one of the creditors of the succession for the succession.

Lastly, as there are two sets of titles or classes, we think it should thereafter be determined by the reference to the effect of the pleadings and by reference to evidence, in which set or class each title is included.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed in so far as it decrees that the plea of *res judicata* be maintained as to George W. Lewis, the intervenor.

To this extent the judgment is affirmed.

It is ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed as to the plaintiff heirs of Ameron Ledoux; as to these the plea of *res judicata* is overruled.

And to this extent the judgment is annulled.

The case is remanded to be reinstated and the remaining issues tried.

ON APPLICATION FOR A REHEARING.

The heirs of Ameron Ledoux, appellants, apply for the insertion of a statement in our decree as to who shall pay costs.

The one cast on appeal pays costs of appeal, is read in every judgment.

It follows, in this case, the appellant is not concerned in the matter of costs; they are due by appellees.

If the judgment is for appellants, on any issue, the appellees pay costs.

As to the costs in the District Court, it will be time enough to tax them when the final decree will be rendered in that court.

The plaintiffs and appellants have not applied for a rehearing.

This statement does not require a rehearing, as it is, in effect, included in our decree.

The intervenor has filed an application, not for a rehearing, but for a correction or modification of the judgment.

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The judgment pleaded as *res judicata* divided the titles to property into two classes.

1. "Those which appear to have been sold by the late H. M. Hyams, deceased, to I. S. Hyams, his son and administrator.

2. "Those which I. S. Hyams purchased from parties who had purchased said properties, or more properly the life estate thereto of H. M. Hyams at the confiscation sales made by the United States Marshal, by virtue of the orders issued in the matter of the United States vs. H. M. Hyams, No. 7685 of the docket of the United States Court."

The property of the first class is referred to in the reasons for judgment, and in the judgment as property held under a simulated title and as still belonging to the succession.

While property of the second class is referred to as having been acquired under a confiscation sale.

In the nature of things the plea of *res judicata* could only apply to the latter.

This judgment appealed from, as to the intervenor, we have affirmed.

We have, in view of conflicting allegations in the pleadings and insufficiency of the evidence, declined to determine whether the properties involved belonged to the first or second class.

We have considered and still consider that all issues are open for examination and determination, as relates to intervenor, save that relating to property of the second class.

The issue, as we appreciated the judgment from which this appeal was taken, was *res judicata vel non* as to the second class.

In that case there is no need of correcting our decree.

But if there was anything decreed touching the first class as barred by the plea of *res judicata* (we have found nothing of the sort), it must be considered modified and restricted by our views as just expressed.

As to the property of the first class the issues are open for determination.

The application is granted in so far as it may be needful.

It is therefore ordered and adjudged that our former decree is corrected and modified in accordance with the views above expressed.

Rehearing refused.

No. 11,959.

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IN THE MATTER OF THE LIQUIDATION OF THE SOUTHERN WOOD
MANUFACTURING AND CREOSOTING COMPANY, LIMITED.

The claimant for exemption from the payment of taxes, did not employ five hands, in operating the property used in the manufacture of articles of wood. A manufactory of articles of wood is exempt only where five hands or more are employed.

Prescription for taxes runs from the end of the year for which they have been assessed, and is interrupted by the litigation rendered necessary for their collection.

The taxes were not extinguished by prescription.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Branch K. Miller for John T. Whitaker, Plaintiff in Rule to Cancel Taxes, Appellee.

E. A. O'Sullivan, City Attorney, and George W. Flynn, Assistant City Attorney, for Defendant in Rule, Appellants.

Submitted on briefs March 27, 1896.

Reinstated April 8, 1896.

Argued and submitted December 2, 1896.

Opinion handed down December 14, 1896.

MCENERY, J. The judgment of the lower court was reversed on appeal on the ground that the plaintiff in rule was without interest in the matter.

A rehearing was granted March 15, 1897.

ON THE REHEARING.

Samuel L. Gilmore, City Attorney; W. B. Sommerville, Assistant City Attorney, and F. C. Zacharie, appeared for Defendants in Rule.

Submitted on rehearing on brief April 15, 1897.

Opinion handed down April 26, 1897.

Liquidation of Manufacturing and Creosoting Co.

The opinion of the court on rehearing was delivered by

BREAU, J. This action was brought by the purchaser of certain property for the cancellation of taxes bearing thereon for the years 1891, 1892 and 1893, on the ground that the property was exempt from taxation, and the taxes, liens and privileges were prescribed.

The purchaser recovered a judgment decreeing that the taxes of 1891 and 1892 be canceled.

From the judgment the State and city of New Orleans prosecute this appeal.

By the testimony we are informed that the property in 1891 and 1892 was used in the manufacture of wood and in creosoting lumber. The lumber was sawed in definite lengths and sizes, fence boards, cross-ties; the sills of houses were sawed as required for sale in the market, and bridge material and other material were sawed in definite lengths, and the required tenons and mortises were made.

The company used a small engine and cross-cut saw to cut the pieces into the required dimensions. We understand that they had a mortise and tenon machine.

After the material had been given the needful shape, the element of water was removed from the wood by the use of a large cylinder six feet in diameter by one hundred feet in length.

It was shown that the creosoting process was effective only where the lumber is first cut in the shape it was intended to be used, and that afterward it was dried; otherwise the testimony shows the treatment by permeating it with oil or other preservative is not useful in prolonging the life of the material, because it was stated by the witness who testified upon that subject; if it is cut after it is creosoted it exposes the under surface where the oil does not permeate, the wood deteriorates and decays.

Ordinary lumber, it is stated, will live in use only a few years; but it is claimed that creosoted lumber will not decay; that it is practically indestructible.

The ground urged by the appellee: that the evidence in the case fails to show that more than five hands were employed in any of the years involved, was the first which invited our attention.

We have found no testimony of record in regard to the number of hands employed in the factory. The plant's operations does not lead us to infer that more than five hands were employed.

The law upon the subject is quite clear.

Liquidation of Manufacturing and Creosoting Co.

The Constitution (Art. 207) ordains that the property employed in the manufacture of wood products is exempted, provided more than five hands are given occupation.

The purpose evidently was to invite the investment of capital in property to be employed in manufacturing articles of commerce, and at the same time offer a broader field to laborers and artisans for employment as skilled operators.

The employment of five hands or more in the factory is as essential, as the investment in property engaged in the manufacture of articles of wood, in order that the claim of exemption may come within the exempting clause. *Moore vs. City of New Orleans*, 48 An. 1452. The plea of prescription is equally as unfounded.

The factory was in operation in 1892 until May or June. The evidence does not disclose that it was in operation in 1891. Tax liens and privileges are prescribed by the lapse of three years from the time they become due. The taxes, in this case, became due on the first day of January, 1893; the answer of the tax collector to the petition to cancel the taxes was filed in July, 1895, clearly interrupting prescription. It follows from the conclusion reached, on the two points stated by us, if we were to hold that in view of the facts of this case the purchaser at sheriff's sale could stand in judgment to compel the cancellation of taxes due by the former owner of the property, none the less the claimant for exemption here is absolutely without right to a judgment of exemption from taxes, unless he proves that he employed the number required for exemption.

We do not specially pass upon the ground heretofore sustained by this court, after having heard the case originally, further than to state that it does not appear to us that the decision was erroneous; but, if we should grant that it was, the claimant would still be without any right to exemption.

It is therefore ordered, adjudged and decreed that the judgment heretofore rendered by us in this case is affirmed at cost of claimant for exemption from payment of taxes.

It follows that the judgment of the District Court is annulled, avoided and reversed.

It is ordered and decreed that plaintiff's demand be rejected.





